This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 066 109 224

Digitized by Google

USHER A. MOREN
ATTORNEY-AT-LAW

John F. Neal,
417-418 Tremont Bldg.,
Boston, Mass.

HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

# MASSACHUSETTS REPORTS

# 176

CASES ARGUED AND DETERMINED

IN THE

## SUPREME JUDICIAL COURT

OF

## MASSACHUSETTS

MARCH 1900 — OCTOBER 1900

GEORGE F. TUCKER

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1901

Digitized by Google

*Copyright, 1900, 1901,*
BY LITTLE, BROWN, AND COMPANY.

UNIVERSITY PRESS:
JOHN WILSON AND SON, CAMBRIDGE, U.S.A.

Digitized by Google

# JUDGES

OF THE

# SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. OLIVER WENDELL HOLMES, CHIEF JUSTICE.
HON. MARCUS P. KNOWLTON.
HON. JAMES M. MORTON.
HON. JOHN LATHROP.
HON. JAMES M. BARKER.
HON. JOHN W. HAMMOND.
HON. WILLIAM CALEB LORING.

---

ATTORNEY GENERAL.

HON. HOSEA M. KNOWLTON.

Digitized by Google

Digitized by Google

# TABLE

## OF THE CASES REPORTED.


Abbott (Campbell *v.*) . . . 246
Adams *v.* Jones . . . . . 185
Adams Express Co. (Graves *v.*) . . . . . 280
Albertstamm (Anderson *v.*) . 87
Anderson *v.* Albertstamm . . 87
——— (Bruce *v.*) . . . . 161
——— *v.* Learoyd . . . . 431
Andrews *v.* Andrews . . . 92
Angus *v.* Scully . . . . . 357
A. O. H. Widows' & Orphans' Fund (Doherty *v.*) . . . 285
Arnold *v.* Eastman Freight Car Heater Co. . . . . 135
Atlantic Novelty Manuf. Co. (Eaves *v.*) . . . . . 369
Atlas National Bank *v.* National Exchange Bank . . 300
Ayer (Wiessner *v.*) . . . . 425

Baker (Broadway National Bank *v.*) . . . . . 294
Barker *v.* Lawrence Manuf. Co. . . . . 203
Barrows (Commonwealth *v.*) . 17
Bassett *v.* Drew . . . . . 141
Batchelder *v.* Cambridge . . 384
Baylies *v.* French . . . . 1
Bieberbach (Produce Exchange Trust Co. *v.*) . . . . . 577
Boomer *v.* Wilbur . . . . 482
Boston (D'Amico *v.*) . . . 599
——— (Dana *v.*) . . . . 97
——— (Dexter *v.*) . . . . 247
——— (Holleran *v.*) . . . 75
——— (Kelly *v.*) . . . . 75
Boston & Albany Railroad (Silsby *v.*) . . . . . 158
——— (Whicher *v.*) . . . 275
Boston & Maine Railroad (Simpson *v.*) . . . . . 359
Boston Elevated Railway (Scannell *v.*) . . . . . 170
——— (Shea *v.*) . . . . . 170
Boston Street Commissioners (Lincoln *v.*) . . . . . 210
Boston Terminal Co. (Goodyear Shoe Machinery Co. *v.*) . . . . . 115
Brigham, petitioner . . . . 223
Broadway National Bank *v.* Baker . . . . . 294
——— *v.* Lewis . . . . . 294
——— *v.* Small . . . . . 294
Brockton (Small *v.*) . . . . 15
Browne *v.* Turner . . . . 9
Bruce *v.* Anderson . . . . 161
Bucknam *v.* Bucknam . . . 229
Burrell *v.* Way . . . . . 164
Burton (Demelman *v.*) . . . 363
Butler (Smith *v.*) . . . . . 38

Cambridge (Batchelder *v.*) . . 384
Campbell *v.* Abbott . . . . 246
Carlisle (Munroe *v.*) . . . . 199
Celluloid Co. *v.* Haines . . . 415
Chick *v.* Nute . . . . . 57
Chisholm *v.* New England Telephone & Telegraph Co. . 125
Clapp *v.* Way . . . . . 164
——— *v.* Wilder . . . . . 332
Clark *v.* Supreme Council of the Royal Arcanum . . . 468


Digitized by Google

Clinton *v.* Norfolk Mutual Fire Ins. Co. . . . . 486
Colburn (Durgin *v.*) . . . . 110
Commonwealth *v.* Barrows . 17
——— *v.* Danziger . . . . 290
——— *v.* Goldsmith . . . 104
——— *v.* Graham . . . . 5
——— *v.* McCance . . . . 292
——— *v.* Morris . . . . . 19
——— *v.* Mullen . . . . 132
——— *v.* Rozen . . . . . 129
Congregational Home Missionary Society (Sherman *v.*) . 349
Cooke *v.* Plaisted . . . . 374
Coolidge (Lyman *v.*) . . . 7
County Commissioners (Watertown *v.*) . . . . . 22
Creavin *v.* Newton Street Railway . . . . . 529

Dallinger *v.* Richardson . . 77
Dame (White *v.*) . . . . . 542
D'Amico *v.* Boston . . . . 599
Dana *v.* Boston . . . . . 97
Danahy *v.* Noonan . . . . 467
Danforth *v.* Groton Water Co.. 118
Danvers (Richardson *v.*) . . 413
Danziger (Commonwealth *v.*) . 290
Deerfield (Reed *v.*) . . . . 473
Demelman *v.* Burton . . . 363
Dewey (Munroe *v.*) . . . . 184
Dexter *v.* Boston . . . . . 247
——— *v.* Harvard College . 192
Doherty *v.* A. O. H. Widows' & Orphans' Fund . . . . 285
D'Ooge *v.* Leeds . . . . . 558
Drew (Bassett *v.*) . . . . 141
Dudley *v.* Dudley . . . . 34
——— *v.* Milton . . . . 167
Durgin *v.* Colburn . . . . 110
Dyer (Way *v.*) . . . . . 448

Eastman Freight Car Heater Co. (Arnold *v.*) . . . . 135
Eaves *v.* Atlantic Novelty Manuf. Co. . . . . 369
Edgerly *v.* Lawson . . . . 551
Edwards (Weeks *v.*) . . . 453
Emerson *v.* Paine . . . . 391

Fallon (Mulhall *v.*) . . . . 266
Faxon *v.* Jones . . . . . 138
Faxon *v.* Jones . . . . . 206
Fay *v.* Harrington . . . . 270
Fitzpatrick *v.* Gilson . . . 477
——— (Hurlburt *v.*) . . . 287
——— *v.* Nordstrom . . . 231
F. P. Robinson Co. (Old Colony Railroad *v.*) . . . . 387
Framingham Water Co. *v.* Old Colony Railroad . . . . 404
——— (Old Colony Railroad *v.*) . . . . . 404
French (Baylies *v.*) . . . . 1
——— (J. H. Wentworth Co. *v.*) . . . . . 442
——— (Rotch *v.*) . . . . 1

Gargan *v.* West End Street Railway . . . . . 106
Gilson (Fitzpatrick *v.*) . . . 477
Goddard (Hartnett *v.*) . . . 326
Goldsmith (Commonwealth *v.*). 104
Goodyear Shoe Machinery Co. *v.* Boston Terminal Co. . . 115
Graham (Commonwealth *v.*) . 5
Graves *v.* Adams Express Co. 280
Green (McDonald *v.*) . . . 113
Griffing (Seaver *v.*) . . . . 59
Gross *v.* Milligan . . . . . 566
Groton Water Co. (Danforth *v.*) . . . . . 118
——— (Vale Mills *v.*) . . . 118

Haines (Celluloid Co. *v.*) . . 415
Hamlin (Martin *v.*) . . . . 180
——— *v.* New York, New Haven, & Hartford Railroad . 514
Harrington (Fay *v.*) . . . . 270
Harris *v.* Starkey . . . . . 445
Hartnett *v.* Goddard . . . . 326
Harvard College (Dexter *v.*) . 192
——— (Warren *v.*) . . . . 192
Hayward *v.* Hopewell . . . 310
——— *v.* Leeson . . . . 310
Healey *v.* Wellesley & Boston Street Railway . . . . . 440
Holleran *v.* Boston . . . . 75
Hooper *v.* Shaw . . . . . 190
Hopewell (Hayward *v.*) . . 310
Hopkins *v.* O'Leary . . . . 258
Hudson *v.* Roxbury Institution for Savings . . . . . 522
Humphreys *v.* Wilton . . . 451

Digitized by Google

Humphreys (Wilton *v.*) . . 253
Hurlburt *v.* Fitzpatrick . . . 287
Hyde Park (Pegler *v.*) . . . 101

Jenkins (Stone *v.*) . . . . 544
J. H. Wentworth Co. *v.* French . . . . . 442
Johnson (Radigan *v.*) . . . 433
Jones (Adams *v.*) . . . . . 185
——— (Faxon *v.*) . . . . 138
——— (Faxon *v.*) . . . . 206
——— *v.* Pacific Mills . . . 354

Kelly *v.* Boston . . . . . 75
——— *v.* Morrison . . . . 531
Kenny (Stinson *v.*) . . . . 429
Kidder Press Manuf. Co. (New York Bank Note Co. *v.*) . 151
Knapp *v.* New York & Boston Despatch Express Co. . . 401
——— *v.* New York, New Haven, & Hartford Railroad . 401
Knight (Rothschild *v.*) . . . 48

Lamson (Morrison *v.*) . . . 536
Lawrence Manuf. Co. (Barker *v.*) . . . . . 203
Lawson (Edgerly *v.*) . . . 551
Learoyd (Anderson *v.*) . . . 431
Leeds (D'Ooge *v.*) . . . . 558
Leeson (Hayward *v.*) . . . 310
Lewis (Broadway National Bank *v.*) . . . . . 294
Lincoln *v.* Boston Street Commissioners . . . . . 210
Lyman *v.* Coolidge . . . . 7

Mabee (Parke *v.*) . . . . 236
McCance (Commonwealth *v.*) . 292
McCarty *v.* Nugent . . . . 124
McDonald *v.* Green . . . . 113
McGinnis *v.* Medway . . . 67
McLauthlin *v.* Smith . . . 46
McLean *v.* Wiley . . . . 233
Marshall *v.* Mason . . . . 216
Martin *v.* Hamlin . . . . 180
Martyn *v.* New York & Boston Despatch Express Co. . . 401
——— *v.* New York, New Haven, & Hartford Railroad . 401
Mason (Marshall *v.*) . . . . 216
Medway (McGinnis *v.*) . . . 67
Milligan (Gross *v.*) . . . . 566
Milton (Dudley *v.*) . . . . 167
Moore *v.* Wildey Casualty Co. 418
Morris (Commonwealth *v.*) . 19
Morrison (Kelly *v.*) . . . . 531
——— *v.* Lamson . . . . 536
——— (Pollock *v.*) . . . . 83
Morse *v.* Natick . . . . . 510
Mulhall *v.* Fallon . . . . 266
Mullen (Commonwealth *v.*) . 132
Munroe *v.* Carlisle . . . . 199
——— *v.* Dewey . . . . . 184
Murphy *v.* Needham . . . 422

Natick (Morse *v.*) . . . . 510
National Construction Co. *v.* Travelers' Ins. Co. . . . 121
National Exchange Bank (Atlas National Bank *v.*) . . 300
National Granite Bank *v.* Tyndale . . . . . 547
Needham (Murphy *v.*) . . . 422
New England Telephone & Telegraph Co. (Chisholm *v.*) 125
Newton Street Railway (Creavin *v.*) . . . . . 529
New York & Boston Despatch Express Co. (Knapp *v.*) . 401
——— (Martyn *v.*) . . . . 401
New York Bank Note Co. *v.* Kidder Press Manuf. Co. . 151
New York, New Haven, & Hartford Railroad (Hamlin *v.*) . . . . . 514
——— (Knapp *v.*) . . . . 401
——— (Martyn *v.*) . . . . 401
——— (Welch *v.*) . . . . 393
Noonan (Danahy *v.*) . . . 467
Nordstrom (Fitzpatrick *v.*) . 231
Norfolk Mutual Fire Ins. Co. (Clinton *v.*) . . . . . 486
Nugent (McCarty *v.*) . . . 124
Nute (Chick *v.*) . . . . . 57

Old Colony Railroad *v.* F. P. Robinson Co. . . . . 387
——— *v.* Framingham Water Co. . . . . 404
——— (Framingham Water Co. *v.*) . . . . . 404
——— (Stanley *v.*) . . . . 145
O'Leary (Hopkins *v.*) . . . 258

Digitized by Google

Pacific Mills (Jones *v.*) . . 354
Paine, petitioner . . . . . 242
Paine (Emerson *v.*) . . . . 391
Parke *v.* Mabee . . . . . 236
Parsons (Weeks *v.*) . . . . 570
Paul Boyton Co. (Smith *v.*) . 217
Pearl *v.* West End Street Railway . . . . . 177
Pease *v.* Supreme Assembly Royal Society of Good Fellows . . . . . 506
Pegler *v.* Hyde Park . . . 101
Pickering (Walkup *v.*) . . . 174
Plaisted (Cooke *v.*) . . . . 374
Plant *v.* Woods . . . . . 492
Pollock *v.* Morrison . . . . 83
Produce Exchange Trust Co. *v.* Bieberbach . . . . . 577
——— *v.* Worcester Brewing Co. . . . . 577
Prouty *v.* Union Hardware Co. 155

Radigan *v.* Johnson . . . . 433
Redford *v.* Woburn . . . . 520
Reed *v.* Deerfield . . . . 473
Richardson (Dallinger *v.*) . . 77
——— *v.* Danvers . . . . 413
Roche *v.* Sawyer . . . . . 71
——— *v.* Smith . . . . . 595
Rotch *v.* French . . . . . 1
Rothschild *v.* Knight . . . 48
Roxbury Institution for Savings (Hudson *v.*) . . . . 522
Royal Arcanum (Clark *v.*) . . 468
Royal Society of Good Fellows (Pease *v.*) . . . . . 506
Rozen (Commonwealth *v.*) . . 129

Sawyer (Roche *v.*) . . . . 71
Scannell *v.* Boston Elevated Railway . . . . . 170
Scully (Angus *v.*) . . . . 357
Seaver *v.* Griffing . . . . 59
Shaw (Hooper *v.*) . . . . 190
Shea *v.* Boston Elevated Railway . . . . . 170
Sherman *v.* Congregational Home Missionary Society . 349
Shreve *v.* Shreve . . . . . 456
Silsby *v.* Boston & Albany Railroad . . . . . 158
Simpson *v.* Boston & Maine Railroad . . . . . 359
Small (Broadway National Bank *v.*) . . . . . 294
——— *v.* Brockton . . . . 15
Smith *v.* Butler . . . . . 38
——— (McLauthlin *v.*) . . 46
——— *v.* Paul Boyton Co. . 217
——— (Roche *v.*) . . . . 595
Somerville (Staples *v.*) . . . 237
Stanley *v.* Old Colony Railroad 145
Staples *v.* Somerville . . . 237
Starkey (Harris *v.*) . . . . 445
Stedman (Tallant *v.*) . . . 460
Stinson *v.* Kenny . . . . . 429
Stone *v.* Jenkins . . . . . 544
Supreme Assembly Royal Society of Good Fellows (Pease *v.*) . . . . . 506
Supreme Council of the Royal Arcanum (Clark *v.*) . . . 468

Tallant *v.* Stedman . . . . 460
Travelers' Ins. Co. (National Construction Co. *v.*) . . . 121
Treadwell *v.* Treadwell . . . 554
Turner (Browne *v.*) . . . . 9
Tyndale (National Granite Bank *v.*) . . . . . 547

Union Hardware Co. (Prouty *v.*) . . . . . 155

Vale Mills *v.* Groton Water Co. 118

Waite *v.* Worcester Brewing Co. . . . . 283
Walkup *v.* Pickering . . . 174
Warren *v.* Harvard College . 192
Watertown *v.* County Commissioners . . . . . 22
Way (Burrell *v.*) . . . . . 164
—— (Clapp *v.*) . . . . . 164
—— *v.* Dyer . . . . . 448
Weeks *v.* Edwards . . . . 453
——— *v.* Parsons . . . . 570
Welch *v.* New York, New Haven, & Hartford Railroad . 393
Wellesley & Boston Street Railway (Healey *v.*) . . . 440
West End Street Railway (Gargan *v.*) . . . . . 106

Digitized by Google

West End Street Railway (Pearl *v.*) . . . . . 177
Whicher *v.* Boston & Albany Railroad . . . . . 275
White *v.* Dame . . . . . 542
Wiessner *v.* Ayer . . . . . 425
Wilbur (Boomer *v.*) . . . . . 482
Wilder (Clapp *v.*) . . . . . 332
Wildey Casualty Co. (Moore *v.*) . . . . . 418
Wiley (McLean *v.*) . . . . . 233
Willwerth *v.* Willwerth . . . 265
Wilton *v.* Humphreys . . . . 253
——— (Humphreys *v.*) . . . 451
Woburn (Redford *v.*) . . . . 520
Woods (Plant *v.*) . . . . . 492
Worcester Brewing Co. (Produce Exchange Trust Co. *v.*) 577
——— (Waite *v.*) . . . . . 283
Wright *v.* Young . . . . . 100
Young (Wright *v.*) . . . . . 100

Digitized by Google

Digitized by Google

# TABLE OF CASES

## CITED BY THE COURT.


Abbey *v.* Long, 44 Kans. 688 298
——— *v.* W. B. Grimes Dry Goods Co. 44 Kans. 415 296
Abbott *v.* Bradstreet, 55 Maine, 530 277
——— *v.* Cottage City, 143 Mass. 521 213
Adam *v.* British & Foreign Steamship Co. 79 L. T. (N. S.) 31 268
Adams *v.* Adams, 139 Mass. 449 560
——— *v.* ———, 154 Mass. 290 94
——— *v.* Fox, 40 Barb. 442 163
——— *v.* Morgan, 150 Mass. 143 346
——— *v.* New Jersey Steamboat Co. 151 N. Y. 163 277
——— *v.* O'Connor, 100 Mass. 515 160
Adamson, In re, L. R. 8 P. & D. 253 255
Adasken *v.* Gilbert, 165 Mass. 443 137
Adderly *v.* Storm, 6 Hill, 624 448
Agawam *v.* Hampden, 130 Mass. 528 18
Alchin's trusts, In re, L. R. 14 Eq. 230 353
Alden *v.* Springfield, 121 Mass. 27 212
Aldrich *v.* Gaskill, 10 Cush. 155 169
Allen *v.* Flood, [1898] A. C. 1 499
——— *v.* Howe, 105 Mass. 241 337
American Academy *v.* Harvard College, 12 Gray, 582 194
American Legion of Honor *v.* Perry, 140 Mass. 580 267
American Railway-Frog Co. *v.* Haven, 101 Mass. 398 443
American Steamship Co. *v.* Bryan, 83 Penn. St. 446 277
Ames *v.* Bates, 119 Mass. 397 47
——— *v.* Colburn, 11 Gray, 390 589
Anon. 1 Mod. 209 179
Archer's case, [1892] 1 Ch. 322 318
Armory *v.* Melrose, 162 Mass. 556 389
Armour *v.* Pecker, 123 Mass. 143 160
Ashcroft *v.* Eastern Railroad, 126 Mass. 196 361
Aston *v.* Newton, 134 Mass. 507 521
Atkins *v.* Bordman, 2 Met. 457 518
Atlanta & Charlotte Air-Line Railway *v.* Gravitt, 93 Ga. 369 267
Attorney General *v.* Duke of Northumberland, 7 Ch. D. 745 196
——— *v.* Earl of Lonsdale, 1 Sim. 105 195
——— *v.* Fletcher, 5 L. J. Ch. 75 352
——— *v.* Jamaica Pond Aqueduct, 133 Mass. 361 411
——— *v.* Sidney Sussex College, 34 Beav. 654 196
——— *v.* ———, L. R. 4 Ch. 722 196
——— *v.* Simonds, 111 Mass. 256 476
——— *v.* Syderfin, 2 Vern. 226, *n.* 352
——— *v.* Wax Chandlers' Co. L. R. 6 H. L. 1 335
Augusta Railway *v.* Glover, 92 Ga. 132 269
Austin *v.* Cambridgeport Parish, 21 Pick. 215 337
Avery *v.* New York Central & Hudson River Railroad, 106 N. Y. 142 342
Ayling *v.* Kramer, 133 Mass. 12 336
Ayres *v.* Hartford Ins. Co. 17 Iowa, 176 489

Bachelder *v.* Fiske, 17 Mass. 464 576
Backus *v.* Chapman, 111 Mass. 386 169
Bacon *v.* Pomeroy, 104 Mass. 577 145
Badger *v.* Boardman, 16 Gray, 559 341
Bagnall *v.* Carlton, 6 Ch. D. 371 318
Bain *v.* Lescher, 11 Sim. 397 8
Bainard *v.* Newton, 154 Mass. 255 77
Baker *v.* Cook, 11 Mass. 236 163
——— *v.* Cushman, 127 Mass. 105 476
——— *v.* Stone, 136 Mass. 405 551
Balch *v.* Stone, 149 Mass. 39 245
Baldwin *v.* Dow, 130 Mass. 416 553
——— *v.* Soule, 6 Gray, 321 208
Ball *v.* Reese, 58 Kans. 614 296
Ballou *v.* Earle, 17 R. I. 441 282
Bank of New Zealand *v.* Simpson, 82 L. T. (N. S.) 102 158
Barber *v.* Barber, 3 Myl. & Cr. 688 8
Barker *v.* Braham, 2 W. Bl. 866 179
——— *v.* ———, 3 Wils. 368 179
——— *v.* St. Quintin, 12 M. & W. 441 163
Barnard *v.* Schrafft, 168 Mass. 211 206


Digitized by Google

Barnes v. Chase, 128 Mass. 211 232
——— v. Springfield, 4 Allen, 488 27
Barre National Bank v. Hingham Manuf. Co. 127 Mass. 563 444
Barrett v. Murphy, 140 Mass. 133 331
Bartlett, petitioner, 163 Mass. 509 513
Batchelder, petitioner, 147 Mass. 465 196
——— v. Batchelder, 139 Mass. 1 256
Bates v. Bates, 134 Mass. 110 513
——— v. Pilling, 6 B. & C. 38 179
——— v. Westborough, 151 Mass. 174 77
Batione's estate, 136 Penn. St. 308 459
Beale v. Boston, 166 Mass. 53 99, 390
Beals v. Case, 188 Mass. 138 338
Bean v. French, 140 Mass. 229 362
Beck v. Kantorowicz, 3 K. & J. 230 318
Belcher v. Smith, 7 Cush. 482 553
Bemis v. Springfield, 122 Mass. 110 23
Benard v. Grand Lodge of the Ancient Order of United Workmen, 13 So. Dak. 135 472
Benjamin v. Holyoke Street Railway, 160 Mass. 3 173
Benton v. Brookline, 151 Mass. 250 213
Bigelow v. Bigelow, 120 Mass. 320 230
——— v. West End Street Railway, 161 Mass. 393 107
——— v. Worcester, 169 Mass. 390 27
Billings v. Marsh, 153 Mass. 311 185
Bingham v. Jordan, 1 Allen, 378 59
Birch v. Birch, 1 Rob. 675 257
Birkett, In re, 9 Ch. D. 576 196
Birt, In re, L. R. 2 P. & D. 214 257
Bishop v. North Adams Fire District, 167 Mass. 364 411
Blackstone v. County Commissioners, 108 Mass. 68 23
Blake v. County Commissioners, 114 Mass. 583 27
——— v. Midland Railway, 21 L. J. Q. B. 233 268
Blanchard v. Cooke, 144 Mass. 207 58
Bland's case, [1893] 2 Ch. 612 318
Bohn Manuf. Co. v. Hollis, 54 Minn. 223 501
Bond's appeal, 31 Conn. 183 189
Bonnemort v. Gill, 167 Mass. 338 447
Borden v. Mercer, 163 Mass. 7 166
Bosher v. Richmond & Harrisonburg Land Co. 89 Va. 455 318
Boston v. Boston & Albany Railroad, 170 Mass. 95 251
Boston Rolling Mills v. Cambridge, 117 Mass. 396 77
Boston Safe Deposit & Trust Co. v. Coffin, 152 Mass. 95 62
Boston Seamen's Friend Society v. Boston, 116 Mass. 181 215
Bouch v. Sproule, 12 App. Cas. 385 561
Boulcott v. Boulcott, 2 Drew. 25 8
Bourke v. Callanan, 160 Mass. 195 37
Bowen v. Matheson, 14 Allen, 499 500
Bowker v. Bowker, 148 Mass. 198 245
Bowley v. Walker, 8 Allen, 21 23
Bradstreet v. Clark, 21 Pick. 389 335
Brady v. Norcross, 172 Mass. 331 137
Braintree v. Hingham, 17 Mass. 432 83
Brandenburg v. Thorndike, 139 Mass. 102 458
Brander v. Brander, 4 Ves. 800 562
Brannigan v. Union Gold-Mining Co. 98 Fed. Rep. 164 269
Brick Presbyterian Church v. New York, 5 Cow. 538 118
Bridge v. Bridge, 146 Mass. 373 169
Briggs v. Briggs, 135 Mass. 306 183
——— v. Shaw, 9 Allen, 516 63
Brigham v. Clark, 100 Mass. 430 441
——— v. Evans, 113 Mass. 538 598
——— v. Fayerweather, 140 Mass. 411 83
——— v. Worcester, 147 Mass. 446 27
Brighton v. Wilkinson, 2 Allen, 27 15
Brimmer v. Boston, 102 Mass. 19 15, 118
British Seamless Paper Box Co., In re, 17 Ch. D. 467 320
Brooks v. Woodson, 87 Ga. 379 217
Brosnan v. Trulson, 164 Mass. 410 165
Brothers v. Cartwright, 2 Jones, Eq. 118 189
Brown v. Dean, 123 Mass. 254 594
——— v. Goolsby, 34 Miss. 487 43
——— v. Lapham, 3 Cush. 551 432
——— v. People's Ins. Co. 11 Cush. 280 490
——— v. Trail, 89 Fed. Rep. 641 298
Browne v. Turner, 174 Mass. 150 14
Brownville Maine Slate Co. v. Hill, 175 Mass. 532 160
Bruce v. Cincinnati Railroad, 83 Ky. 174 268
——— v. Moon, 57 S. C. 60 158
Brunsdon v. Allard, 2 El. & El. 19 163
Bryan v. Traders' Ins. Co. 145 Mass. 389 489
Bryson v. Holbrook, 159 Mass. 280 188
Buckingham v. Harris, 10 Col. 455 478
Budd v. Zoller, 52 Mo. 238 478
Burbank v. Dennis, 101 Cal. 90 318
Burbridge v. New Albany & Salem Railroad, 9 Ind. 546 117
Burgess v. Davis Sulphur Ore Co. 165 Mass. 71 264
——— v. Seligman, 107 U. S. 20 444
Burgie v. Parks, 11 Lea, 84 48
Burnham v. Upton, 174 Mass. 408 597
Burns v. Ancient Order of United Workmen, 153 Mass. 173 286
Burpee v. Sparhawk, 108 Mass. 111 466
Burt v. Advertiser Newspaper Co. 154 Mass. 238 208, 273
Butler v. Baker, 17 R. I. 582 599
——— v. Mullen, 100 Mass. 453 162
——— v. Worcester, 112 Mass. 541 215
Butterfield v. Byron, 153 Mass. 517 858

Cadge, In re, L. R. 1 P. & D. 543 257
Callahan v. Woodbridge, 171 Mass. 595 191
Cambridge v. County Commissioners, 167 Mass. 137 27

Digitized by Google

Cambridge v. Railroad Commissioners, 153 Mass. 161 27
Campau v. Van Dyke, 15 Mich. 371 228
Campbell v. Whorisky, 170 Mass. 63 558
Carew v. Rutherford, 106 Mass. 1 498
Carling's case, 1 Ch. D. 115 822
Carpenter v. Farnsworth, 106 Mass. 561 590
——— v. New York, New Haven, & Hartford Railroad, 124 N. Y. 53 277
Casey v. Weaver, 141 Mass. 280 235
Cassidy v. Mason, 171 Mass. 507 336
Champney v. Davy, 11 Ch. D. 949 196
Chandler v. Bacon, 30 Fed. Rep. 538 318
——— v. Railroad Commissioners, 141 Mass. 208 27
Chapin v. Harris, 8 Allen, 594 342
Chapman v. Brown, 6 Ves. 404 196
——— v. Coffin, 14 Gray, 454 594
——— v. Eland, 2 New Rep. 82 202
Chase v. Chase, 6 Gray, 157 95
——— v. ———, 132 Mass. 473 68
——— v. Hubbard, 153 Mass. 91 265
——— v. Kittredge, 11 Allen, 49 217
Chauncey v. Leominster, 172 Mass. 340 181
Cheatham v. Yarbrough, 90 Tenn. 77 478
Cherokee v. Town Lot & Land Co. 52 Iowa, 279 389
Chesapeake, Ohio, & Southwestern Railroad v. Higgins, 85 Tenn. 620 269
Cheshire v. Adams & Cheshire Reservoir Co. 119 Mass. 356 14
Chicago, Burlington, & Quincy Railroad v. Nebraska, 170 U. S. 57 15
Chicago, Rock Island, & Pacific Railway v. Sturm, 174 U. S. 710 53
Christopherson v. Naylor, 1 Mer. 320 187
Churchill v. Ricker, 109 Mass. 209 364
Churchward v. Churchward, [1895] Prob. 7 228
Claflin v. Boston & Albany Railroad, 157 Mass. 489 361
——— v. Claflin, 149 Mass. 19 468
Clapp v. Rice, 13 Gray, 403 575
Clark v. Brown, 116 Mass. 504 208
——— v. Burns, 118 Mass. 275 277
——— v. Clark, 8 Cush. 385 96
——— v. Easton, 146 Mass. 43 423
——— v. Holbrook, 146 Mass. 366 144
——— v. Martin, 49 Penn. St. 289 340
——— v. New England Ins. Co. 6 Cush. 342 421, 490
——— v. Patterson, 158 Mass. 388 471, 551
——— v. Simmons, 150 Mass. 357 188
Clarke v. Schwarzenberg, 164 Mass. 347 470
Cleveland v. Quilty, 128 Mass. 578 447
Clifford v. Atlantic Cotton Mills, 146 Mass. 47 200
Coan v. Marlborough, 164 Mass. 206 264
Cobb v. Fogg, 166 Mass. 466 162
Cobb v. Tirrell, 137 Mass. 148 162
Codman v. Brooks, 167 Mass. 499 245
Cole v. Tucker, 164 Mass. 486 291
Coleman v. Meade, 13 Bush, 358 597
Collins v. Greenfield, 172 Mass. 78 428
Commonwealth v. Alden, 148 Mass. 113 134
——— v. Bishop, 165 Mass. 148 18
——— v. County Commissioners, 8 Pick. 348 28
——— v. Dalzell, 152 Penn. St. 217 443
——— v. Dunleay, 157 Mass. 386 133
——— v. Fitzgerald, 164 Mass. 587 18
——— v. Forrest, 170 Penn. St. 40 414
——— v. Gagne, 153 Mass. 205 132
——— v. Gay, 153 Mass. 211 134
——— v. Harmon, 2 Gray, 289 208
——— v. Hart, 11 Cush. 130 134
——— v. Hodgkins, 170 Mass. 197 291
——— v. Hunt, 4 Met. 111 503
——— v. Kennedy, 108 Mass. 292 132
——— v. McCormick, 150 Mass. 270 68
——— v. McGovern, 10 Allen, 193 138
——— v. Marzynski, 149 Mass. 68 105
——— v. Merriam, 136 Mass. 433 68
——— v. Morris, 176 Mass. 19 291
——— v. Murphy, 147 Mass. 577 134
——— v. Nash, 135 Mass. 541 331
——— v. Parks, 155 Mass. 531 291
——— v. Phillipsburg, 10 Mass. 78 546
——— v. Prescott, 151 Mass. 60 291
——— v. Roberts, 155 Mass. 281 291
——— v. Stockbridge, 13 Mass. 293 23
——— v. Tobias, 141 Mass. 129 134
Conkling v. Krakauer, 70 Tex. 735 597
Connecticut River Railroad v. County Commissioners, 127 Mass. 50 252
Connecticut Trust & Safe Deposit Co. v. Melendy, 119 Mass. 449 466
Conners v. Hennessey, 112 Mass. 96 484
Connihan v. Thompson, 111 Mass. 270 455
Cook v. Fiske, 12 Gray, 491 597
——— v. Welch, 9 Allen, 350 479
——— v. Wolfendale, 105 Mass. 401 541
Cooper v. Reynolds, 10 Wall. 308 58
Cork v. Blossom, 162 Mass. 330 484
County Commissioners, petitioners, 143 Mass. 424 215
Coupe v. Platt, 172 Mass. 458 74
Cowan v. Iowa State Ins. Co. 40 Iowa, 551 489
Cox v. Central Vermont Railroad, 170 Mass. 129 282
Creamer v. West End Street Railway, 156 Mass. 320 107
Crease v. Babcock, 10 Met. 525 443
Crompton v. Belknap Mills, 3 Fisher, Pat. Cas. 536 131
Cross v. Brown, 19 R. I. 220 54
——— v. Cross, 108 N. Y. 628 95
——— v. Plymouth, 125 Mass. 557 213
Crum v. Sawyer, 132 Ill. 443 472
Cummings v. Arnold, 3 Met. 486 290, 428

Digitized by Google

Cummings v. Hodgdon, 147 Mass. 21 81
——— v. Thompson, 7 Met. 132 393
Curtis v. Kiley, 153 Mass. 128 484
Cushing v. Spaulding, 164 Mass. 287 181
Cutter v. Cambridge, 6 Allen, 20 23
Cutts v. Haskins, 9 Mass. 543 81
——— v. Parsons, 2 Mass. 440 545

Daland v. Williams, 101 Mass. 571 560
Daly v. New Jersey Steel & Iron Co. 155 Mass. 1 267, 401
Damon v. Reading, 2 Gray, 274 27
Dana v. Wentworth, 111 Mass. 291 341
Daniels v. Pratt, 143 Mass. 216 471
Darcy v. Kelley, 153 Mass. 438 196
Davenport v. Holland, 2 Cush. 1 43
Davis v. Arthur, 170 Mass. 449 167
——— v. Ball, 6 Cush. 505 346
——— v. Parsons, 157 Mass. 584 235
——— v. Taylor, 41 Ill. 405 202
Dawley v. Wagner Palace Car Co. 169 Mass. 315 279
Dawson v. Small, L. R. 18 Eq. 114 196
Day v. Lawrence, 167 Mass. 371 252
Dean v. Lowell, 135 Mass. 55 27
——— v. Smith, 169 Mass. 569 264
Deni v. Pennsylvania Railroad, 181 Penn. St. 525 269
Dennick v. Central Railroad, 103 U. S. 11 268
Dennie v. Williams, 135 Mass. 28 221
Densmore Oil Co. v. Densmore, 64 Penn. St. 43 318
Derome v. Vose, 140 Mass. 575 81
De Ruvigne's case, 5 Ch. D. 306 323
Desmond v. Stebbins, 140 Mass. 339 479
Dexter v. Shepard, 117 Mass. 480 450
Dickenson v. Fitchburg, 13 Gray, 546 99, 103
Dickinson v. Dickinson, 167 Mass. 474 94
——— v. Whiting, 141 Mass. 414 517
Dillon v. Parker, 1 Swanst. 359 459
Dimock v. Van Bergen, 12 Allen, 551 188
Dineen v. Williams, 138 Mass. 367 232
Dobbins v. Brown, 12 Penn. St. 75 117
Doe v. Collins, 2 T. R. 498 169
—— v. Palmer, 16 Q. B. 747 255
Dolphin v. Robins, 7 H. L. Cas. 390 94
Donohue v. Flanagan, 9 N. Y. Supp. 273 597
Donovan v. Boston & Maine Railroad, 158 Mass. 450 587
Dorgan v. Boston, 12 Allen, 223 213
Dover Stamping Co. v. Noyes, 151 Mass. 342 417
Dowd v. Chicopee, 116 Mass. 98 521
Driscoll v. West End Street Railway, 159 Mass. 142 178
Drohan v. Lake Shore & Michigan Southern Railway, 162 Mass. 435 162
Drummond v. Crane, 159 Mass. 577 3
Duclos v. Cunningham, 102 N. Y. 678 478

Eames v. Worcester & Nashua Railroad, 105 Mass. 193 519
Earle v. Earle, 11 Allen, 1 581
——— v. Reed, 10 Met. 387 468
Eden v. Ridsdales Railway Lamp & Lighting Co. 23 Q. B. D. 368 822
Edmands v. Boston, 108 Mass. 535 103
Edmunds v. Rockwell, 125 Mass. 363 145
Edson v. Edson, 108 Mass. 590 227
Edwards v. Sumner, 4 Cush. 393 162
Efron v. Wagner Palace Car Co. 59 Mo. App. 641 278
Eliot v. McCormick, 144 Mass. 10 53
Ellis's estate, In re, 55 Minn. 401 95
Ellis v. Lynn & Boston Railroad, 160 Mass. 341 173
——— v. Welch, 6 Mass. 246 117
Elsey v. Odd Fellows' Mutual Relief Association, 142 Mass. 224 286, 471
Ely v. Ely, 6 Gray, 439 257
Emery v. Lowell, 104 Mass. 13 77
——— v. Parrott, 107 Mass. 95 318
Emma Silver Mining Co. v. Grant, 11 Ch. D. 918 318
——— v. Lewis, 4 C. P. D. 396 318
Episcopal City Mission v. Appleton, 117 Mass. 326 336
Erlanger v. New Sombrero Phosphate Co. 3 App. Cas. 1218 318
Essex v. Brooks, 164 Mass. 79 192
Essex Public Road Board v. Skinkle, 140 U. S. 334 15
Evans v. Bacon, 99 Mass. 213 228

Fairbanks v. Lamson, 99 Mass. 533 352
——— v. Snow, 145 Mass. 153 224
Fairchild v. Fairchild, 8 Dick. 678 95
Farlow v. Ellis, 15 Gray, 229 160
Farmington River Water Power Co. v. County Commissioners, 112 Mass. 206 215
Faxon v. Jones, 176 Mass. 138 207, n.
——— v. ———, 176 Mass. 206 138, n.
Fenton v. Torrey, 133 Mass. 138 184
Fifth Avenue Bank v. Colgate, 120 N. Y. 381 112
Firth v. Denny, 2 Allen, 468 458
Fischer v. Bell, 91 Ind. 243 478
Fisher v. McGirr, 1 Gray, 1 252
——— v. Sargent, 10 Cush. 250 44
Fisk v. Attorney General, L. R. 4 Eq. 521 196
Fitzpatrick v. Gilson, 176 Mass. 477 597
Flagg v. Worcester, 13 Gray, 601 77
Flood's case, Hobart, 136 196
Folger v. Columbian Ins. Co. 99 Mass. 267 53
Foote v. Hartford Ins. Co. 119 Mass. 259 490
Forbes v. Harrington, 171 Mass. 386 144
Forsyth v. Hooper, 11 Allen, 419 484
Foster v. Park Commissioners, 133 Mass. 321 27
——— v. Smith, 156 Mass. 379 64
Fowle v. Torrey, 135 Mass. 87 471, 551

Digitized by Google

Fowle *v.* Ward, 113 Mass. 548 328
Francis *v.* Baker, 45 Minn. 83 597
Frankel *v.* Frankel, 178 Mass. 214 473, 550
Franklin *v.* Armfield, 2 Sneed, 305 196
——— *v.* Greene, 2 Allen, 519 38
Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350 443
Freeman *v.* Alderson, 119 U. S. 185 53
——— *v.* Hunnewell, 163 Mass. 210 74
French *v.* Hayward, 16 Gray, 512 393
Frost *v.* Courtis, 167 Mass. 251 8
——— *v.* Earnest, 4 Whart. 86 117
Fuller *v.* Arms, 45 Vt. 400 342
——— *v.* Fuller, Cr. Eliz. 422 458

Galbraith *v.* West End Street Railway, 165 Mass. 572 173
Gale *v.* Nickerson, 144 Mass. 415 226, 447
Geiger *v.* Perkiomen & Reading Turnpike Road, 167 Penn. St. 582 414
Gerrish *v.* Gary, 1 Allen, 213 546
Gerry *v.* Stoneham, 1 Allen, 319 252
Gibbons *v.* Mahon, 136 U. S. 549 561
Gibbs *v.* Bryant, 1 Pick. 118 576
Gifford *v.* Thompson, 115 Mass. 478 560
Gillan *v.* Gillan, 1 L. R. (Ir.) 114 352
Gilman *v.* Gilman, 126 Mass. 26 55
Glass *v.* Hulbert, 102 Mass. 24 570
Glavin *v.* Rhode Island Hospital, 12 R. I. 411 179
Gleason *v.* Goodrich Transportation Co. 32 Wis. 85 277
Glynn *v.* Central Railroad, 175 Mass. 510 200
Goddard, petitioner, 16 Pick. 504 291
Goldthwait *v.* Haverhill & Groveland Street Railway, 160 Mass. 554 206
Gooch *v.* Association for Relief of Aged Indigent Females, 109 Mass. 558 351
Goodrich *v.* Davis, 11 Met. 473 274
——— *v.* Lunenberg, 9 Gray, 88 252
——— *v.* Willard, 11 Gray, 380 56
Goodwin *v.* Marblehead, 1 Allen, 37 28
Gordon *v.* Cummings, 152 Mass. 513 246
Gorham *v.* Gross, 125 Mass. 232 484
Gott *v.* Pulsifer, 122 Mass. 235 115
Gowling *v.* Thompson, L. R. 11 Eq. 366, *n.* 187
Graham *v.* Badger, 164 Mass. 42 356
——— *v.* Graham, 81 N. W. Rep. 44 94
Graves *v.* Lake Shore & Michigan Southern Railroad, 137 Mass. 33 282
Gray *v.* Blanchard, 8 Pick. 283 337
—— *v.* Sherman, 5 Allen, 198 9
Green *v.* Fox, 7 Allen, 85 235
——— *v.* Hogan, 153 Mass. 462 513
——— *v.* Lucas, 33 L. T. (N. S.) 584 478
Greene *v.* Greene, 2 Gray, 361 227
Greenleaf *v.* Francis, 18 Pick. 117 499
Greenup *v.* Sewell, 18 Ill. 53 454
Greenwood *v.* Curtis, 4 Mass. 93 463
——— *v.* ———, 6 Mass. 358 463
Gregory *v.* Gregory, 78 Maine, 187 94
Gretton *v.* Haward, 1 Swanst. 409 459
Greville *v.* Tylee, 7 Moore P. C. 320 257
Groustra *v.* Bourges, 141 Mass. 7 499
Guild *v.* Richards, 16 Gray, 322 337

Haddock *v.* Grinnell Manuf. Co. 109 Penn. St. 372 112
Hadley *v.* County Commissioners, 11 Cush. 394 27
Hagerthy *v.* Phillips, 88 Maine, 336 575
Hall *v.* Bumstead, 20 Pick. 2 143
—— *v.* Southwick, 27 Minn. 234 432
Hallett *v.* Fowler, 10 Allen, 36 546
Hamlin *v.* New York & New England Railroad, 160 Mass. 459 361
——— *v.* New York, New Haven, & Hartford Railroad, 166 Mass. 462 515
——— *v.* ———, 170 Mass. 548 516
Hammond *v.* Granger, 131 Mass. 351 145
Hancock National Bank *v.* Ellis, 166 Mass. 414 295
——— *v.* ———, 172 Mass. 39 295
——— *v.* Farnum, 176 U. S. 640 296
Handy *v.* Canning, 166 Mass. 107 441
Hanlan's case, 119 Mass. 59 282
Hanover *v.* Turner, 14 Mass. 227 94
Hapgood *v.* Wellington, 136 Mass. 217 393
Harback *v.* Boston, 10 Cush. 295 411
Harding *v.* Boston, 163 Mass. 14 484
——— *v.* Littlehale, 150 Mass. 100 509
Hardy *v.* Smith, 136 Mass. 328 96
Harlow *v.* Thomas, 15 Pick. 66 346
Harris *v.* Quincy, 171 Mass. 472 132
Hart *v.* Pennsylvania Railroad, 112 U. S. 331 282
Hartshorn *v.* Worcester, 113 Mass. 111 99
Harvard College *v.* Boston, 104 Mass. 470 213
Hastings *v.* Lovejoy, 140 Mass. 261 429
——— *v.* Stetson, 130 Mass. 76 208
Haussoulier *v.* Hartsinck, 7 T. R. 738 540
Haven *v.* County Commissioners, 155 Mass. 467 390
Hayden *v.* Stoughton, 5 Pick. 528 337
Hayes *v.* Harmony Grove Cemetery, 108 Mass. 400 180
Hazard *v.* Wason, 152 Mass. 268 55
Henderson *v.* Louisville & Nashville Railroad, 123 U. S. 61 277
Herring *v.* Downing, 146 Mass. 10 546
Heydon's case, 11 Co. 5 a 201
Hichens *v.* Congreve, 4 Russ. 562 318
——— *v.* ———, 1 Russ. & Myl. 150, *n.* 318
Hicks *v.* New York, New Haven, & Hartford Railroad, 164 Mass. 424 382
Higgins *v.* Central New England & Western Railroad, 155 Mass. 176 268
Hilbourne *v.* Suffolk, 120 Mass. 393 213
Hill *v.* Boston, Hoosac Tunnel, & Western Railroad, 144 Mass. 284 282
—— *v.* Freeman, 3 Cush. 257 160
Hilliard *v.* Richardson, 3 Gray, 349 484
Hillman *v.* Whitney, 2 Allen, 268 55

Digitized by Google

Hinkley v. House of Refuge, 40 Md. 461 459
Hirschorn v. Canney, 98 Mass. 149 160
Hitchcock v. Northwestern Ins. Co. 26 N. Y. 68 489
Hobart v. Plymouth, 100 Mass. 159 27
Hodge v. Hodgdon, 8 Cush. 294 232
Hodnett v. Boston & Albany Railroad, 156 Mass. 86 267
Hoe v. Cottrell, 17 Blatchf. 546 131
Hoffman v. Hoffman, 46 N. Y. 30 94
Holbrook v. American Ins. Co. 1 Curtis C. C. 193 489
——— v. Holbrook, 114 Mass. 568 228
Holden v. Phœnix Rattan Co. 168 Mass. 570 580
——— v. Starks, 159 Mass. 508 479
Holly v. Gosling, 3 E. D. Smith (N. Y.) 262 479
Holmes v. Drew, 151 Mass. 578 601
Holten v. Cook, 12 Mass. 574 546
Holyoke Bank v. Burnham, 11 Cush. 183 444
Hood v. Adams, 124 Mass. 481 183
——— v. Boardman, 148 Mass. 330 65
Hopkins v. Smith, 162 Mass. 444 337
Hoppin v. Buffum, 9 R. I. 513 443
Horton v. Champlin, 12 R. I. 550 163
——— v. Earle, 102 Mass. 448 188
Hosmer v. Sargent, 8 Allen, 97 460
Houghton v. Butler, 106 Mass. 547 478
Houlihan v. Connecticut River Railroad, 164 Mass. 555 267, 401
Howarth v. Lombard, 175 Mass. 570 295
Howe v. Ray, 113 Mass. 88 581
Howell v. Manglesdorf, 33 Kans. 104 296
Howes v. Maxwell, 157 Mass. 333 237
Howland v. Coffin, 9 Pick. 52 403
——— v. Slade, 155 Mass. 415 244
Hubbard v. Hubbard, 19 Col. 13 228
Hughes v. Lawrence, 160 Mass. 474 521
Humphreys v. Wilton, 176 Mass. 451 254, n.
Hunt v. Adams, 6 Mass. 519 589
——— v. Boston, 152 Mass. 168 389
Hunter v. Bullock, L. R. 14 Eq. 45 196
Huntress v. Place, 137 Mass. 409 186
Hutchinson v. Cummings, 156 Mass. 329 74
Hyde Park v. County Commissioners, 117 Mass. 416 27

Illinois Central Railroad v. Handy, 63 Miss. 609 277
Imbescheid v. Old Colony Railroad, 171 Mass. 209 103
Indian Head National Bank v. Clark, 166 Mass. 27 588
Ingraham v. Ingraham, 169 Ill. 432 196
International Trust Co. v. Wilson, 161 Mass. 80 595
Irving v. Houstoun, 4 Paton Sc. App. 521 562

Jackson v. Jackson, 39 N. Y. 153 217
——— v. Phillips, 14 Allen, 539 351
James v. Newton, 142 Mass. 366 241
Janvrin, petitioner, 174 Mass. 514 275
Jeffries v. Jeffries, 117 Mass. 184 342
Jenny v. Herle, 1 Str. 591 540
Jewell v. Lee, 14 Allen, 145 341
Jochumsen v. Suffolk Savings Bank, 3 Allen, 87 81
Johnson v. Kinnicut, 2 Cush. 153 518
Jones v. Boston, 104 Mass. 461 213
——— v. Knappen, 63 Vt. 391 459
——— v. Smith, 121 Mass. 15 331
——— v. Williams, Ambl. 651 195
Jordan v. Lovejoy, 20 Pick. 86 232
Jory v. Supreme Council American Legion of Honor, 105 Cal. 20 471
Josselyn v. Lacier, 10 Mod. 294 540
Joy v. St. Louis, 138 U. S. 1 158
Judd v. Fargo, 107 Mass. 264 108
Junior v. Missouri Electric Light & Power Co. 127 Mo. 79 128

Kalley v. Baker, 132 N. Y. 1 596
Kelley v. Meins, 135 Mass. 231 512
Kelso v. Boston, 120 Mass. 297 215
Kennedy v. Doyle, 10 Allen, 161 587
Kenney v. Habich, 137 Mass. 421 594
Kennison v. Beverly, 146 Mass. 467 77
Kent v. Dunham, 142 Mass. 216 196
Keys v. Johnson, 68 Penn. St. 42 479, 597
Kimins v. Boston Five Cents Savings Bank, 141 Mass. 33 528
King v. Cross, 175 U. S. 396 54
——— v. Faist, 161 Mass. 449 429
Kingman, petitioner, 153 Mass. 566 14
Kinnier v. Kinnier, 45 N. Y. 535 95, 227
Kinsley v. Lake Shore & Michigan Southern Railroad, 125 Mass. 54 278
Kip v. New York & Harlem Railroad, 67 N. Y. 227 117
Knapp v. Wallace, 41 N. Y. 477 596
Kneil v. Egleston, 140 Mass. 202 471
Knight v. West Jersey Railroad, 108 Penn. St. 250 269
Kock v. Emmerling, 22 How. 69 479

Lake Erie & Western Railroad v. Priest, 131 Ind. 413 342
Lancaster v. Choate, 5 Allen, 530 111
Landers v. Dexter, 106 Mass. 531 85
Langmaid v. Reed, 159 Mass. 409 38
Latta v. Brown, 96 Tenn. 343 459
Latter v. Braddell, 50 L. J. C. P. 166 178
Lazarus v. Commonwealth Ins. Co. 5 Pick. 76 489
Lee v. Butler, 167 Mass. 426 417
Legal Tender Cases, 12 Wall. 457 117
Leith v. Leith, 39 N. H. 20 94
Leland v. Hayden, 102 Mass. 542 560
Leonard v. First Congregational Society in Taunton, 2 Cush. 462 549
——— v. Haworth, 171 Mass. 496 513
——— v. Storer, 115 Mass. 86 200
Lerned v. Wannemacher, 9 Allen, 412 429
LeRoy v. York, 20 Johns. 430 216
Lessard v. Revere, 171 Mass. 294 242

Digitized by Google

Lewis *v.* Monahan, 173 Mass. 122 549
——— *v.* New York Sleeping Car Co. 143 Mass. 267 277
Lexington *v.* County Commissioners, 165 Mass. 296 27
Light *v.* Merriam, 132 Mass. 283 466
Lilienthal *v.* Suffolk Brewing Co. 154 Mass. 185 346
Lilley *v.* Fifty Associates, 101 Mass. 432 341
Lincoln *v.* Commonwealth, 164 Mass. 1 27, 212
——— *v.* Gay, 164 Mass. 537 83
——— *v.* Warren, 150 Mass. 309 27
——— *v.* Worcester, 8 Cush. 55 252
Linton *v.* Smith, 8 Gray, 147 179
Lister *v.* Lane, [1893] 2 Q. B. 212 200
Liverpool Waterworks Co. *v.* Atkinson, 6 East, 507 343
Loan *v.* Boston, 106 Mass. 450 521
Locke *v.* Hale, 165 Mass. 20 336
Lockwood *v.* Halsey, 41 Kans. 166 597
Lombard *v.* Boyden, 5 Allen, 249 8
——— *v.* Oliver, 7 Allen, 155 209
Loomis *v.* Wadhams, 8 Gray, 557 55
Looney *v.* McLean, 129 Mass. 33 74
Lord *v.* Wheeler, 1 Gray, 282 359
Lord Cromwel's case, 2 Co. 70 341
Loring *v.* Salisbury Mills, 125 Mass. 138 43
——— *v.* Steineman, 1 Met. 204 447
Loud *v.* Loud, 129 Mass. 14 95
Louvalle *v.* Menard, 6 Ill. 89 454
Love *v.* Miller, 53 Ind. 294 597
Low *v.* Low, 173 Mass. 580 570
Lowell *v.* Spaulding, 4 Cush. 277 200
Lucke *v.* Clothing Cutters & Trimmers' Assembly, 77 Md. 396 503
Luke *v.* Calhoun County, 52 Ala. 115 269
Lumb *v.* Jenkins, 100 Mass. 527 268
Lundin *v.* Schoeffel, 167 Mass. 465 342
Lydney & Wigpool Iron Ore Co. *v.* Bird, 33 Ch. D. 85 318
Lyman *v.* Boston, 164 Mass. 99 389
Lyon *v.* Lyon, 2 Gray, 367 96

Macauley *v.* Tierney, 19 R. I. 255 501
McAvoy *v.* Wright, 137 Mass. 207 179, 201
McCarthy *v.* New England Order of Protection, 153 Mass. 314 267, 401, 471, 507
McCarty's appeal, 110 Penn. St. 379 326
McDonald *v.* Massachusetts General Hospital, 120 Mass. 432 351
——— *v.* Napier, 14 Ga. 89 163
Macdonald *v.* Whitfield, 8 App. Cas. 733 575
McDonough *v.* O'Niel, 113 Mass. 92 37
McFeely *v.* Scott, 128 Mass. 16 81
McGavock *v.* Woodlief, 20 How. 221 478
McGowan *v.* McGowan, 14 Gray, 119 37
McGrath *v.* Conway, 116 Mass. 360 232
M'Hugh, petitioner, 3 Cush. 452 232
McHugh *v.* Boston, 173 Mass. 408 13
McKay's case, 2 Ch. D. 1 318
McKay *v.* Hand, 168 Mass. 270 137
McKim *v.* Doane, 137 Mass. 195 447
——— *v.* Hibbard, 142 Mass. 422 323
Macleed *v.* Snee, 2 Stra. 762 540
McMahon *v.* McHale, 174 Mass. 320 275
M'Millan *v.* Sun Life Assurance Co. 4 Scots L. T. 98 414
McMullin *v.* Church, 82 Va. 501 202
McQueeny *v.* Phœnix Ins. Co. 52 Ark. 257 491
McReynolds *v.* Counts, 9 Grat. 242 459
Magruder *v.* Colston, 44 Md. 349 443
Mahoney *v.* Boston, 171 Mass. 427 12, 423
Mandell *v.* Fidelity & Casualty Ins. Co. 170 Mass. 173 123
Maneely *v.* M'Gee, 6 Mass. 143 463
Manning *v.* Lowell, 130 Mass. 21 77
Mannville Co. *v.* Worcester, 138 Mass. 89 267
Mansfield *v.* Edwards, 136 Mass. 15 575
Marble *v.* Chapin, 132 Mass. 225 208
Marcus *v.* Collamore, 168 Mass. 56 450
Markham *v.* Russell, 12 Allen, 573 208
Marsden *v.* Cambridge, 114 Mass. 490 99
Marsh *v.* American Legion of Honor, 149 Mass. 512 471, 507
Martin *v.* Hawks, 15 Johns. 405 163
Marvin *v.* New Bedford, 158 Mass. 464 521
Marwedel *v.* Cook, 154 Mass. 235 74
Mason *v.* Massa, 122 Mass. 477 594
Massachusetts Catholic Order of Foresters *v.* Callahan, 146 Mass. 391 471
May *v.* Wood, 172 Mass. 11 504
Mayhew *v.* Pentecost, 129 Mass. 332 545
Maynard *v.* Northampton, 157 Mass. 218 102
Meacham *v.* Fitchburg Railroad, 4 Cush. 291 213
Melcher *v.* Chase, 105 Mass. 125 169
Mendell *v.* Dunbar, 169 Mass. 74 217
Mercer *v.* Corbin, 117 Ind. 450 414
——— *v.* Graves, L. R. 7 Q. B. 499 163
Merchant *v.* Sessions, 5 N. Y. Civ. Proc. Rep. 24 163
Merchants' National Bank *v.* National Bank of the Commonwealth, 139 Mass. 513 309
Merriam, In re, 141 N. Y. 479 191
Merrifield *v.* Cobleigh, 4 Cush. 178 341
Mersman *v.* Werges, 112 U. S. 139 590
Metcalf *v.* Framingham Parish, 128 Mass. 370 65
Metropolitan Coal Consumers' Association *v.* Scrimgeour, [1895] 2 Q. B. 604 322
Middleton *v.* Thompson, 163 Penn. St. 112 478
Milford Savings Bank *v.* Joslyn, 59 Kans. 778 298
Miller *v.* M'Intyre, 6 Pet. 61 43
——— *v.* Washburn, 117 Mass. 371 346



Digitized by Google

Miller v. Wilkinson, 167 Mass. 136 166, 238
Miller's River National Bank v. Jefferson, 138 Mass. 111 393
Milligan v. Wedge, 12 Ad. & El. 737 179
Mills v. Davison, 9 Dick. 659 342
——— v. Farmer, 1 Mer. 55 352
——— v. ———, 19 Ves. 483 352
Miltimore v. Miltimore, 40 Penn. St. 151 227
Minot v. Baker, 147 Mass. 348 352
——— v. Paine, 99 Mass. 101 560
Mobile v. Kimball, 102 U. S. 691 13
Moffatt v. Kenny, 174 Mass. 311 601
Mogul Steamship Co. v. McGregor, [1892] A. C. 25 501
Monaghan v. Goddard, 173 Mass. 468 165
——— v. Putney, 161 Mass. 388 166, 233
Montague v. Dawes, 14 Allen, 369 184
Moore v. Massachusetts Benefit Association, 165 Mass. 517 162
Morrison v. McDermott, 6 Allen, 122 124
Morriss v. Garland, 78 Va. 215 459
Morse v. Lowell, 7 Met. 152 466
Moseley v. Ames, 5 Allen, 163 393
——— v. Washburn, 167 Mass. 345 882
Moses v. Bierling, 31 N. Y. 462 479
Mount Hope Cemetery v. Boston, 159 Mass. 509 13
Moynihan v. Allyn, 162 Mass. 270 74
Mulcare v. Welch, 160 Mass. 58 575
Mulchey v. Methodist Religious Society, 125 Mass. 487 201
Munigle v. Boston, 3 Allen, 230 117
Murfin v. Detroit & Erin Plank-Road Co. 113 Mich. 675 414
Murphy v. City Coal Co. 172 Mass. 324 128
Myers v. Hinds, 110 Mich. 300 414

Nant-y-glo & Blaina Ironworks Co. v. Grave, 12 Ch. D. 738 822
Nash v. Minnesota Title Ins. & Trust Co. 163 Mass. 574 209
National Bank v. Case, 99 U. S. 628 443
National Exchange Bank v. National Bank of North America, 132 Mass. 147 306
National Granite Bank v. Tyndale, 173 Mass. 517 548
Neely v. Hoskins, 84 Maine, 386 342
Nelson v. Dodge, 116 Mass. 367 160
Neveu v. Sears, 155 Mass. 303 264
New v. Bonaker, L. R. 4 Eq. 655 196
Newberry v. Lee, 3 Hill (N. Y.) 523 179
Newbert v. Cunningham, 50 Maine, 231 168
Newhall v. Clark, 3 Cush. 376 541
New Orleans v. New Orleans Water Works Co. 142 U. S. 79 15
New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73 318
Newton v. Joyce, 166 Mass. 83 291
Nichols v. Boston & Maine Railroad, 174 Mass. 379 150
Nichols v. Nichols, 10 C. E. Green, 60 227
Nicholson v. Nicholson, 113 Ind. 131 228
Noble v. Bosworth, 19 Pick. 314 846
North Reading v. County Commissioners, 7 Gray, 109 216
Norwich v. County Commissioners, 13 Pick. 60 13
Norwood v. Baker, 172 U. S. 269 212, 251
Noyes v. Springfield, 116 Mass. 87 84

Oakes v. Manufacturers' Ins. Co. 131 Mass. 164 488
——— v. ———, 135 Mass. 248 123
O'Brien v. Ball, 119 Mass. 28 116
——— v. Keefe, 175 Mass. 274 45
Ocean Ins. Co. v. Portsmouth Marine Railway, 3 Met. 420 53
Odell v. Odell, 10 Allen, 1 197
O'Donnell v. Clinton, 145 Mass. 461 467
O'Driscoll v. Faxon, 156 Mass. 527 264
Old Colony Railroad v. Evans, 6 Gray, 25 598
——— v. Framingham Water Co. 153 Mass. 561 412
——— v. Miller, 125 Mass. 1 103
O'Linda v. Lothrop, 21 Pick. 292 108, 518
Oliver v. North End Street Railway, 170 Mass. 222 173
Olympia, In re, [1898] 2 Ch. 153 320
Opinion of the Justices, 163 Mass. 589 201
Orrell v. Hampden Ins. Co. 13 Gray, 431 488
Oxford v. Leathe, 165 Mass. 254 200

Packer v. Lockman, 115 Mass. 72 581
——— v. Thomson-Houston Electric Co. 175 Mass. 496 357
Pain v. Société St. Jean Baptiste, 172 Mass. 319 507
Park v. Whitney, 148 Mass. 278 4
Parker v. Barnard, 135 Mass. 116 246
——— v. Nightingale, 6 Allen, 341 342
Parks v. Boston, 15 Pick. 198 103, 117
——— v. Hampden, 120 Mass. 395 218
Parsons v. Loyd, 3 Wils. 341 179
Patch v. Boston, 146 Mass. 52 119, 389
Peabody v. Fraternal Accident Association, 89 Maine, 96 421
——— v. Hamilton, 106 Mass. 217 268
Pearson's case, 5 Ch. D. 336 318
Pearson v. Lemaitre, 5 M. & G. 701 208
Peck v. Conway, 119 Mass. 546 339
Peet v. Sherwood, 43 Minn. 447 478
Penniman's Will, In re, 20 Minn. 245 257
Pennoyer v. Neff, 95 U. S. 714 53
People v. Dawell, 25 Mich. 247 94
Perin v. Carey, 24 How. 465 195
Phelps v. Phelps, 143 Mass. 570 65
Phillips v. Blatchford, 137 Mass. 510 130
——— v. Marblehead, 148 Mass. 326 390
——— v. Smith, 110 Mass. 61 367
Philpott v. Missouri Pacific Railroad, 85 Mo. 164 269
Phosphate Sewage Co. v. Hartmont, 5 Ch. D. 394 318

Digitized by Google

Pickle *v.* Byers, 16 Ind. 383 201
Pierce *v.* Boston, 164 Mass. 92 389
——— *v.* Oliver, 13 Mass. 211 454
——— *v.* Prescott, 128 Mass. 140 447
Pieschel *v.* Paris, 2 S. & S. 384 353
Pike *v.* Waltham, 168 Mass. 581 241
Pittsburg Mining Co. *v.* Spooner, 74 Wis. 307 318
Plaquemines Tropical Fruit Co. *v.* Buck, 7 Dick. 219 318
Plummer *v.* Dill, 156 Mass. 426 74
Plympton *v.* Plympton, 6 Allen, 178 458
Poole *v.* Dean, 152 Mass. 589 267
Porter's trust, In re, 4 K. & J. 188 189
Porter *v.* Wakefield, 146 Mass. 25 471
Post *v.* Weil, 115 N. Y. 361 335
Potter *v.* Baldwin, 133 Mass. 427 581
Power *v.* Fenno, 10 Gray, 249 232
——— *v.* Ocean Ins. Co. 19 La. 28 489
Powers *v.* Codwise, 172 Mass. 425 8
——— *v.* Guardian Ins. Co. 136 Mass. 108 488
Pratt *v.* Lamson, 128 Mass. 528 143
——— *v.* Weymouth, 147 Mass. 245 423
Preston *v.* Smith, 156 Ill. 359 157
Prince *v.* Boston, 111 Mass. 226 215
——— *v.* Crocker, 166 Mass. 347 12
Pritchard *v.* Hennessey, 1 Gray, 294 594
Proctor *v.* Hartigan, 139 Mass. 554 540
——— *v.* ———, 143 Mass. 462 541
Pullman Palace Car Co. *v.* Smith, 73 Ill. 360 277
Putnam *v.* Boyer, 140 Mass. 235 236
Pye *v.* Faxon, 156 Mass. 471 485

Quimby *v.* Durgin, 148 Mass. 104 235
Quinn *v.* Crimmings, 171 Mass. 255 200
——— *v.* Perham, 151 Mass. 162 74

Radigan *v.* Johnson, 174 Mass. 68 438
Railroad Co. *v.* Ellerman, 105 U. S. 166 15
Rand *v.* Hubbell, 115 Mass. 461 560
——— *v.* Newton, 6 Allen, 38 390
Rankin *v.* Fitchburg Ins. Co. 150 Mass. 55 431
Rawson *v.* Dofner, 143 Mass. 76 237
——— *v.* Uxbridge School District, 7 Allen, 125 335
Reed *v.* Reed, 52 Mich. 117 94
Regina *v.* Druitt, 10 Cox C. C. 592 502
——— *v.* Justin, 24 Ont. 327 414
Regina Flour Mill Co. *v.* Holmes, 156 Mass. 11 553
R. E. Lee, The, 2 Abb. (U. S.) 49 277
Rensselaer & Saratoga Railroad *v.* Davis, 43 N. Y. 137 411
Rice *v.* Mayo, 107 Mass. 550 597
Richards *v.* County Commissioners, 120 Mass. 401 28
Richardson *v.* New York Central Railroad, 98 Mass. 85 268
——— *v.* White, 167 Mass. 58 241
——— *v.* Willis, 163 Mass. 130 9
Rider *v.* Ocean Ins. Co. 20 Pick. 259 47
Rigg *v.* Boston, Revere Beach, & Lynn Railroad, 158 Mass. 309 201
Riley *v.* Lowell, 117 Mass. 76 119
Rindge *v.* New England Mutual Aid Association, 146 Mass. 286 286
Robbins *v.* Fletcher, 101 Mass. 115 208
——— *v.* Springfield Street Railway, 165 Mass. 30 173
Roberts *v.* Boston, 149 Mass. 346 390
——— *v.* Lane, 64 Maine, 108 553
Robertson *v.* Norris, 1 Giffard, 421 184
Robinson *v.* Hall, 11 Gray, 483 546
Roby *v.* American Central Ins. Co. 120 N. Y. 510 123
——— *v.* Phelan, 118 Mass. 541 550
Rockport *v.* Webster, 174 Mass. 385 411
Rodney *v.* Strode, 8 Mod. 101 201
Rogers *v.* Ludlow Manuf. Co. 144 Mass. 198 264
Root *v.* New York Central Sleeping-Car Co. 28 Mo. App. 199 277
Ropes *v.* Colgate, 17 Abb. (N. Y.) 136 112
Ross *v.* New England Ins. Co. 120 Mass. 113 88
Roxbury *v.* Boston & Providence Railroad, 2 Gray, 260 150
Royal Arcanum *v.* Tracy, 169 Ill. 123 472
Royce *v.* Burrell, 12 Mass. 395 143
Russell *v.* Barry, 115 Mass. 300 541
Ryerson *v.* Abington, 102 Mass. 526 256
Rymer, In re, [1895] 1 Ch. 19 196

Sabin *v.* Long, 1 Wils. 30 201
St. Paul & Northern Pacific Railway, In re, 84 Minn. 227 411
St. Paul's Church *v.* Attorney General, 164 Mass. 188 197
Salisbury *v.* Andrews, 19 Pick. 250 517
Salomon *v.* Hathaway, 126 Mass. 452 160
Sandford *v.* Wright, 164 Mass. 85 455
Sanger *v.* Newton, 134 Mass. 308 43
Sargent *v.* Knights of Honor, 158 Mass. 557 510
Sawyer *v.* Newburyport, 157 Mass. 480 521
Scanlon *v.* Union Ins. Co. 4 Biss. 511 489
Scudder *v.* Bradbury, 106 Mass. 422 467
Searle *v.* Dwelling House Ins. Co. 152 Mass. 263 421
Sears *v.* Boston, 173 Mass. 71 212, 251
——— *v.* Street Commissioners, 173 Mass. 350 251
Secord *v.* St. Paul, Minneapolis, & Manitoba Railway, 18 Fed. Rep. 221 179
Sessions *v.* New York, Lake Erie, & Western Railroad, 78 Hun, 541 278
Sewall *v.* Sewall, 122 Mass. 156 95
Seward *v.* Vera Cruz, 10 App. Cas. 59 268
Sexton *v.* North Bridgewater, 116 Mass. 200 99
Seymour *v.* Osborne, 11 Wall. 516 131
Sharp *v.* Ropes, 110 Mass. 381 341
Shattuck *v.* Allen, 4 Gray, 540 274
——— *v.* Bill, 142 Mass. 56 179

Digitized by Google

Shattuck v. Stoneham Branch Railroad, 6 Allen, 115 390
Shaw v. Gould, L. R. 3 H. L. 55 228
Shea v. Massachusetts Benefit Association, 160 Mass. 289 286
Sheddy v. Geran, 113 Mass. 378 432
Shelley's case, 1 Co. 88 b 458
Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516 83
Sherman v. Baker, 20 R. I. 446 513
Sherry v. Perkins, 147 Mass. 212 503
Shores v. Hooper, 153 Mass. 228 447
Short v. Devine, 146 Mass. 119 518
Sibbald v. Bethlehem Iron Co. 83 N. Y. 378 478
Silva v. Turner, 166 Mass. 407 451
Simanovich v. Wood, 145 Mass. 180 346
Simmons v. White Brothers, [1899] 1 Q. B. 1005 267
Simons v. Simons, 47 Mich. 253 227
Singer v. Singer, 41 Barb. 189 228
Sirk v. Ela, 168 Mass. 394 346
Sisters of Charity of St. Vincent de Paul v. Kelly, 67 N. Y. 409 217
Skinner v. Shepard, 130 Mass. 180 336
Smith's trusts, In re, 5 Ch. D. 497 189
Smith v. Boston, 7 Cush. 254 218
——— v. Butler, 164 Mass. 37 47
——— v. ———, 176 Mass. 38 46
——— v. Fenner, 1 Gall. 170 255
——— v. Haynes, 111 Mass. 346 8
——— v. Reynolds, 10 Blatchf. 100 181
——— v. Smith, 13 Gray, 209 96
——— v. Snow, 123 Mass. 328 512
Snow v. Paine, 114 Mass. 520 86, 209
Sohier v. Inches, 12 Gray, 385 8
——— v. Trinity Church, 109 Mass. 1 336
Somers v. Thayer, 115 Mass. 163 541
Somerville v. Waltham, 170 Mass. 160 252
Southern Express Co. v. Connor, 12 Nat. Bankr. Reg. 58 546
South Joplin Land Co. v. Case, 104 Mo. 572 318
Spellman v. Chicopee, 181 Mass. 443 521
Spencer v. All Souls College, Wilmot, 163 196
——— v. Scott, 1 B. & P. 19 202
——— v. Williams, 160 Mass. 17 594
Spilman v. Home Circle, 157 Mass. 128 507
Spofford v. Norton, 126 Mass. 533 553
Springer v. Orr, 82 Ill. App. 558 597
Springfield v. Gay, 12 Allen, 612 214
Springfield Institution for Savings v. Copeland, 160 Mass. 380 471
Spring Valley Water Works v. San Mateo Water Works, 64 Cal. 123 411
Sproule v. Bouch, 29 Ch. D. 635 561
Stables v. Ashley, 1 B. & P. 49 202
Stanhope v. Stanhope, 11 P. D. 103 226
Stanwood v. Malden, 157 Mass. 17 213
State v. Collins, 16 R. I. 371 414
——— v. Donaldson, 3 Vroom, 151 503
——— v. Dyer, 67 Vt. 690 503
——— v. Foster, 2 Halst. 101 477
State v. Glidden, 55 Conn. 46 503
——— v. Missouri Pacific Railway, 71 Mo. App. 385 414
——— v. Morris Aqueduct, 17 Vroom, 495 411
——— v. Stewart, 59 Vt. 273 503
State Lunatic Hospital v. Worcester, 1 Met. 437 27
Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. 302 277
Stearn v. Pullman Car Co. 59 Mo. App. 641 278
Stearns v. Hall, 9 Cush. 31 429
Stetson v. Massachusetts Ins. Co. 4 Mass. 330 489
Stevens v. Nichols, 155 Mass. 472 601
——— v. Stevens, 150 Mass. 557 86
Stevenson v. Dana, 166 Mass. 163 450
Stiff v. Ashton, 155 Mass. 130 83
Stillman v. Northrup, 109 N. Y. 473 4
Stockwell v. Fitchburg, 110 Mass. 305 27
Stone v. Heath, 135 Mass. 561 99
——— v. Hubbard, 7 Cush. 595 546
——— v. White, 8 Gray, 589 590
Stoops v. Smith, 100 Mass. 63 158
Stratton v. Physio-Medical College, 149 Mass. 505 8
Sugden v. St. Leonards, L. R. 1 P. D. 154 255
Sullivan v. Arcand, 165 Mass. 364 417
Sumner v. First Parish in Dorchester, 4 Pick. 361 252
Sutton v. Toomer, 7 B. & C. 416 549
Swan v. Tappan, 5 Cush. 104 114
Sweeney v. Ten Mile Oil & Gas Co. 130 Penn. St. 193 479
Swindin, In re, 2 Rob. 192 257
Symonds v. Carter, 32 N. H. 458 208
Szathmary v. Adams, 166 Mass. 145 200

Taft v. Commonwealth, 158 Mass. 526 27
——— v. Dickinson, 6 Allen, 553 467
——— v. Fiske, 140 Mass. 250 367
Taggart v. Fall River, 170 Mass. 325 423
Tasker v. Stanley, 153 Mass. 148 500
Taylor v. Binney, 7 Mass. 479 553
——— v. Goodwin, 4 Q. B. D. 228 414
——— v. Union Traction Co. 184 Penn. St. 465 414
Tebbetts, In re, 5 L. R. 259 466
Teele v. Bishop of Derry, 168 Mass. 341 196, 351
——— v. Boston, 165 Mass. 88 102
Thayer v. Wellington, 9 Allen, 283 196
Thomas v. Beals, 154 Mass. 51 227
——— v. Commercial Union Assurance Co. 162 Mass. 29 490
——— v. Mueller, 106 Ill. 36 472
Thompson v. Boston, 148 Mass. 387 390
——— v. Dodge, 58 Minn. 555 414
——— v. Heywood, 129 Mass. 401 184
——— v. Lowell, Lawrence, & Haverhill Street Railway, 170 Mass. 577 484

Digitized by Google

Thompson v. Whitman, 18 Wall. 457 94
Thurston v. Blanchard, 22 Pick. 18 463
Timberlake v. Parish, 5 Dana (Ky.) 345 459
Tower v. Utica & Schenectady Railroad, 7 Hill, 47 277
Towns v. Hale, 2 Gray, 199 232
Toy v. United States Cartridge Co. 159 Mass. 313 264
Tracy v. Elizabethtown, Lexington, & Big Sandy Railroad, 80 Ky. 259 411
——— v. Howe, 119 Mass. 228 232
——— v. Lincoln, 145 Mass. 357 88
Traders' National Bank v. Rogers, 167 Mass. 315 83
Trade-Mark Cases, 100 U. S. 82 173
Trafton v. Hawes, 102 Mass. 533 343
Trecy v. Jefts, 149 Mass. 211 102
True v. Fuller, 21 Pick. 140 553
Tucker v. Fisk, 154 Mass. 574 447
——— v. Howard, 122 Mass. 529 517
Tufts v. Somerville, 122 Mass. 273 27
Tully v. Fitchburg Railroad, 134 Mass. 499 201
Turner v. Dartmouth, 18 Allen, 291 77
Tuttle v. Bartholomew, 12 Met. 452 553
Twombly v. Monroe, 136 Mass. 464 273
Twomey v. Linnehan, 161 Mass. 91 595
Tyler v. Odd Fellows' Mutual Relief Association, 145 Mass. 134 507

Underwood v. Carney, 1 Cush. 285 518
Union Bank v. Knapp, 3 Pick. 96 587
Union Bank of Chicago v. Kansas City Bank, 126 U. S. 223 325
United Order of the Golden Cross v. Merrick, 168 Mass. 374 286, 470
United States v. Perkins, 163 U. S. 625 191
——— v. Throckmorton, 98 U. S. 61 226
United States National Bank v. Magnuson, 57 Kans. 573 296
Upham v. Emerson, 119 Mass. 509 8
——— v. Prince, 12 Mass. 14 553
Upton v. Sturbridge Cotton Mills, 111 Mass. 446 467

Van Fossen v. State, 37 Ohio St. 317 94
Van Pelt v. Strickland, 60 Kans. 584 298
Vaughan, In re, 33 Ch. D. 187 196
——— v. Street Commissioners, 154 Mass. 143 386
Veazie v. Parker, 72 Maine, 443 597
Vegelahn v. Guntner, 167 Mass. 92 503
Venezuela Railway v. Kisch, L. R. 2 H. L. 99 318
Vennard v. McConnell, 11 Allen, 555 594
Vetaloro v. Perkins, 101 Fed. Rep. 393 270
Vinton v. Baldwin, 88 Ind. 104 478
Vowell v. Thompson, 3 Cranch C. C. 428 443

Walcott v. Kimball, 13 Allen, 460 366
Waldo v. Waldo, 52 Mich. 94 95
Waldron v. Harring, 28 Mich. 493 553
——— v. Lee, 5 Pick. 323 445
Walker v. Cronin, 107 Mass. 555 498
——— v. Mayo, 143 Mass. 42 549
Walla Walla v. Walla Walla Water Co. 172 U. S. 1 15
Walls v. Ducharme, 162 Mass. 432 166
Ward v. Cobb, 148 Mass. 518 597
Warhus v. Bowery Savings Bank, 21 N. Y. 543 528
Warner v. Morrison, 3 Allen, 566 576
Warren v. Boston & Maine Railroad, 163 Mass. 484 201
Washburn v. Bradley, 169 Mass. 86 479
Waters v. Stickney, 12 Allen, 1 447
Watertown v. Mayo, 109 Mass. 315 291
Watkins v. Watkins, 125 Ind. 163 94
Watrous v. Allen, 57 Mich. 362 340
Weber v. Couch, 134 Mass. 26 162
Webster v. Morris, 66 Wis. 366 196
Weed v. Boston, 172 Mass. 28 250
——— v. People, 3 Thomp. & C. 50 19
——— v. ———, 56 N. Y. 628 19
Welch v. Pullman Palace Car Co. 16 Abb. Pr. (N. S.) 352 277
——— v. Wilcox, 101 Mass. 162 517
Wells v. Brigham, 6 Cush. 6 540
Welsh v. Woodbury, 144 Mass. 542 512
Western Union Telegraph Co. v. Caldwell, 141 Mass. 489 455
Weston v. Barnicoat, 175 Mass. 454 330, 504
——— v. Weston, 102 Mass. 514 138
Westport v. County Commissioners, 9 Allen, 203 34
Whalen v. Collins, 164 Mass. 146 85
Whaley Bridge Calico Printing Co. v. Green, 5 Q. B. D. 109 318
Whately v. County Commissioners, 1 Met. 336 27
Wheeler v. Souther, 4 Cush. 606 540
Whelton v. West End Street Railway, 172 Mass. 555 206
White v. New York & New England Railroad, 156 Mass. 181 362
——— v. Worcester Consolidated Street Railway, 167 Mass. 48 173
Whiting v. Boston, 106 Mass. 89 216
Whitman v. Oxford National Bank, 176 U. S. 559 295
Whitney v. Eaton, 15 Gray, 225 160
——— v. Eliot National Bank, 137 Mass. 351 540
——— v. Pullman's Palace Car Co. 143 Mass. 243 278
——— v. Union Railway, 11 Gray, 359 337
Whittemore v. Cutter, 1 Gallison, 429 131
Whittier v. Dana, 10 Allen, 326 429
Whitwell v. Vincent, 4 Pick. 449 160
Wier v. Simmons, 55 Wis. 637 342
Wilcox v. Zane, 167 Mass. 302 74
Willey v. Boston Electric Light Co. 168 Mass. 40 128
Williams, In re, 5 Ch. D. 735 196

Digitized by Google

Williams *v.* Ashton, 1 Johns. & H. 115 257
——— *v.* Clark, 140 Mass. 238 519
——— *v.* Eggleston, 170 U. S. 304 13
——— *v.* Ellis, 5 Q. B. D. 175 414
——— *v.* M'Fall, 2 S. & R. 280 201
——— *v.* Van Tuyl, 2 Ohio St. 336 454
Wilson *v.* Edwards, 8 B. & C. 734 201
——— *v.* Esten, 14 R. I. 621 59
——— *v.* Hatfield, 121 Mass. 551 162
——— *v* Welch, 157 Mass. 77 325
Wilton *v.* Humphreys, 176 Mass. 253 452, *n.*
Windram *v.* French, 151 Mass. 547 267
Wing *v.* Ansonia Clock Co. 102 N. Y. 531 158
Winslow *v.* Draper, 8 Pick. 170 594
——— *v.* Newlan, 45 Ill. 145 202
Witherell *v.* Murphy, 147 Mass. 417 479
Wolcott *v.* Hodge, 15 Gray, 547 466
Wood *v.* Boyd, 145 Mass. 176 362
——— *v.* Cutter, 188 Mass. 149 476
——— *v.* Seaver, 158 Mass. 411 188
Woodman *v.* Metropolitan Railroad, 149 Mass. 335 484
Woodruff Sleeping & Parlor Coach Co. *v.* Diehl, 84 Ind. 474 277
Woods *v.* Verry, 4 Gray, 357 163
Woodward *v.* Spurr, 141 Mass. 288 471, 551
——— *v.* Ware, 37 Maine, 563 43
Worcester *v.* County Commissioners, 100 Mass. 103 119
Worthington *v.* Bearse, 12 Allen, 382 489
Wray *v.* Carpenter, 16 Col. 271 597
Wright *v.* Andrews, 130 Mass. 149 55
——— *v.* Boston, 9 Cush. 233 252
Wyman *v.* Lexington & West Cambridge Railroad, 13 Met. 316 390

Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101 318
Young *v.* Makepeace, 108 Mass. 233 232
——— *v.* Snow, 167 Mass. 287 468

Digitized by Google

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME JUDICIAL COURT

OF

# MASSACHUSETTS.

---

CLARA M. ROTCH & others, executors, *vs.* WILLIAM A. FRENCH.

WILLIAM BAYLIES & another, executors, *vs.* SAME.

Bristol. January 11, 1900. — March 28, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Guaranty not Running to Executor.*

A guaranty "of payment to R. of a dividend of 6% per annum on stock subscribed to this day in" a corporation named, does not run beyond the life of R., a reasonable time having elapsed.

TWO ACTIONS OF CONTRACT, upon guaranties, one to William J. Rotch and the other to A. H. Seabury, in similar form, of the same date, and signed by William A. French, E. A. Potter, W. Herbert Wilson, and H. C. French. Writs dated June 29, 1896. The guaranty to Rotch is given in the opinion.

At the trial in the Superior Court before *Fessenden*, J., the defendant requested the judge to direct a verdict for him in each case, contending that there was no evidence that the guaranties were given for the consideration claimed by the plaintiffs; that



Digitized by Google

they did not cover more than one dividend which it was agreed had been paid, and that they did not run to the executors of Rotch who died in 1893, and of Seabury who died in 1887. The judge ruled otherwise and submitted to the jury the following question: "Was the consideration, if any, of the guaranty, an agreement on the part of the plaintiffs' testator to take and pay for one hundred shares in the capital stock of the French, Potter, & Wilson corporation?" The answer was "Yes." The judge directed the jury to return verdicts for the plaintiffs for the amounts due upon their respective guaranties; and, at the request of the parties, reported the cases for the determination of this court. If the rulings were wrong, the verdicts were to be set aside and new trials granted; otherwise, judgment was to be entered on the verdicts. The facts appear in the opinion.

The cases were argued at the bar in January, 1900, and afterwards were submitted on briefs to all the justices.

*R. M. Morse*, (*L. Bass, Jr.* with him,) for the defendant.

*H. M. Knowlton*, (*F. H. Nash* with him,) for the plaintiffs.

HOLMES, C. J. These are actions upon guaranties signed by the defendant and others in similar form as follows: "Chicago, Jan. 1, 1886. We hereby guarantee the payment to Mr. William J. Rotch of a dividend of 6% per annum on stock subscribed to this day in the corporation of French, Potter & Wilson." It appeared that Rotch and Seabury, the other person receiving a guaranty, respectively subscribed for one hundred shares in the corporation. The plaintiffs contended and the jury found that the agreements to take these shares were the considerations for the guaranties. The first question raised by the exceptions is whether there was any evidence to support these findings. We shall assume for the purposes of decision that the evidence was sufficient. The agreements suggest the consideration upon their face. The defendant testified to an interview on December 28, 1885, in which Rotch and Seabury and another in the morning said that they would each take $10,000, and in the afternoon asked for a guaranty, to which the defendant replied that he and his associates would give it if the subscribers would give them all the money they wanted to make the business a success. This, it appears from other conversation, meant, if they would take $50,000 instead of $30,000.

Digitized by Google

The answer, according to the defendant, was, "We will give you more money later." On January 10, 1886, the defendant met Rotch and the other subscribers, and gave them the certificates, receiving checks or notes in payment. At the same time they asked to have a guaranty sent them, and these guaranties were sent. On this evidence we assume that the jury were warranted in finding that, even if Rotch and Seabury at first promised unconditionally to take the stock, before the bargain was closed or any binding contract made they insisted upon having a guaranty, and that they accepted and paid for their certificates on the express stipulation that they should receive the guaranty which they did receive, and which of course was not a gift. It is true that the defendant and another testified that the real consideration was that Rotch and his fellow subscribers should give more money as it was needed, but that testimony was controverted and the jury had a right to reject it. The dividends were paid under the contract during the lives of Rotch and Seabury, although they made no further subscription or advance. It is not material whether the consideration was in strictness an agreement to subscribe or the subscription itself.

But the defendant contended and asked a ruling to the effect that the guaranties had run out, and upon this ground, in the opinion of a majority of the court, he must prevail. We assume without deciding that more than one dividend was guaranteed, but we are of opinion that the agreement does not purport to be a contract enduring as long as the shares represented by Rotch's and Seabury's certificates shall be in existence, or, in other words, during the whole life of the corporation.

The meaning of the words might vary according to circumstances, and the interpretation of them is a question for the instructed imagination, taking the facts just as they are. When a guaranty is asked for and given in the way in which this was, what is it reasonable to suppose that a normal business man means? No doubt if we consider mainly the object which Rotch and Seabury had in exacting the guaranty, (*Drummond* v. *Crane*, 159 Mass. 577, 579,) the same considerations which led them to want one logically would lead them to want one which should go to the character and value of the stock, one which should be of a duration equal to that of the stock, and which would be as use-

Digitized by Google

ful if they saw fit to sell as if they preferred to keep it. On the other hand, it is not likely that any of the parties looked forward to the defendant's establishing, or binding his estate to establish, an annuity or guaranty fund, to continue as long as the corporation lasted, and to await distribution until the corporation should be dissolved. Probably neither party thought the transaction out to its logical end, or put to himself definitely the question how long the guaranty was to last. Probably whatever result we come to would have raised some demur on the one side or the other if it had been stated at the time. We must decide, therefore, by drawing the line as we think most in accordance with the exact words used, and with what the parties would have been likely to agree upon if they had thought and talked about the matter.

This was not a guaranty offered to the public in the market, as an inducement to subscribe. It was not a guaranty indorsed upon a bond or certificate of stock, as in *Stillman* v. *Northrup*, 109 N. Y. 473. Rotch and Seabury had had previous dealings with the defendant and the other guarantors while the latter were doing business as partners and were selling agents for a corporation in which Rotch and Seabury were interested. Rotch and Seabury wanted the guarantors to form the corporation in which they afterwards took stock, and simply got this separate parol agreement thrown in, although not gratuitously, at the last minute, after they already had become desirous to see the enterprise started.

Under such circumstances it does not seem to us clear that the parties meant to bind themselves for more than a reasonable time, while the conditions remained substantially unchanged, if indeed they went further in their minds than their respective personal relations. See *Park* v. *Whitney*, 148 Mass. 278. The promise guarantees a payment "to Mr. William J. Rotch" personally, without mention of executors, administrators, or assigns. It guarantees no more in terms. A promise to pay a like sum annually to Rotch or Seabury would be limited to payments during their lives. However we might deal with similar words in a different case, we are of opinion that in the present one, after a reasonable time had elapsed, they had no further operation when Rotch and Seabury ceased to be stockholders by death.

Digitized by Google

We do not pretend to think that our conclusion is the only one possible. If it would be going too far in one direction to hold the guaranty absolute, or in the other to confine it to one year's dividends, either of which questions is debatable, there is still the doubt whether Rotch's and Seabury's executors, who represent the persons of their respective testators, are not entitled even now to stand in their testators' shoes. But we think that a line must be drawn somewhere, and that it falls most naturally where we have drawn it. It hardly needs to be added that the question of the scope of the promise is a question of construction not affected by the state of the law as to the right to assign the contract or to sue upon it when assigned in the assignee's own name. *Verdicts set aside.*

---

## COMMONWEALTH *vs.* CATHERINE GRAHAM.

Suffolk. January 16, 1900. — March 28, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Sale of Cigars on the Lord's Day by Common Victualler.*

If one of the purposes for which a common victualler keeps open his restaurant on the Lord's day is the sale of cigars, the keeping of that place open for that purpose is unlawful under St. 1895, c. 434, § 2.

COMPLAINT, under St. 1895, c. 434, § 2, charging the defendant with keeping open her shop for the purpose of doing business therein on August 13, 1899, at Revere, that being the Lord's day.*

At the trial in the Superior Court, before *Sheldon*, J., there was evidence tending to show that the defendant was a common

* The St. 1900, c. 440, § 1, is as follows: "Nothing contained in section two of chapter four hundred and thirty-four of the acts of the year eighteen hundred and ninety-five shall be held to prohibit the retail sale of tobacco in any of its forms on the Lord's Day by licensed innholders, common victuallers, druggists, and newsdealers whose stores are open for the sale of newspapers every day in the week."

Digitized by Google

victualler, duly licensed by the town of Revere; that she kept a restaurant which was open as a dining-room on said day; that in the restaurant on that day she supplied meals to a large number of people, and that to some of them she sold cigars.

The defendant asked the judge to rule that if she was a duly licensed common victualler, and in that capacity kept her restaurant open on the Lord's day, and there supplied meals as her principal business to those that desired them, she could not be convicted on this complaint, although it should appear that she also kept in this restaurant cigars for sale to those of her customers who desired them, and actually did sell, on the Lord's day in said restaurant, cigars. The judge refused to give this ruling.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

The case was submitted on briefs to all the justices.

*C. B. Loud*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth.

BARKER, J. We assume in favor of the defendant that a room kept open by a common victualler merely as a dining-room is not a shop within the meaning of St. 1895, c. 434, § 2. But the ruling asked for by the defendant was too broad. It went upon the ground that if the defendant's principal business was supplying meals she could not be guilty of keeping the place open on the Lord's day. If one of her purposes in keeping the place open was the sale of cigars she was guilty of the offence charged. The sale of cigars in the restaurant on the Lord's day was evidence for the jury that one of the defendant's purposes in keeping it open was to make such sales. Because of this evidence the request was rightly refused. The only exception is to the refusal to give the request. It is to be presumed that correct instructions were in fact given.

*Exceptions overruled.*

Digitized by Google

## FRANK LYMAN, administrator, *vs.* J. RANDOLPH COOLIDGE & others.

Norfolk. January 18, 1900. — March 28, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Will — Codicil — Residuary Clause — Gift not to a Class but passing as Intestate Property.*

By the eleventh clause of the third codicil to his will the testator revoked "the residuary clauses in my will and codicils and in lieu thereof" gave the residue remaining after the payment of specific legacies, provided for in the will and codicils, one third to a nephew, one third to another nephew, one sixth to still another nephew, and one sixth to a niece. After referring to the will and the first and second codicils, the third codicil ratified them save as "changed by this instrument." The will and second codicil contained residuary clauses which were revoked by the eleventh clause of the third codicil; but, after providing in the second codicil that in case of the death of certain legatees before him the legacies given to them by will should be paid to their legal representatives, the testator proceeded, "I further direct that if any of the other legatees named in my will or codicils thereto shall die before my decease, the legacies therein given shall lapse, and the amount thereof shall be included in the residue of my estate." *Held*, the niece having died without issue before the testator, that the gift was not to the persons named as a class, but that the share which she would have taken had she survived the testator passed as intestate property.

PETITION IN EQUITY, by the administrator de bonis non with the will annexed of Susan B. Lyman, asking instructions as to the construction thereof. Hearing before *Lathrop*, J., who reserved the case for the consideration of the full court.

*C. H. Fiske*, for the administrator, read the papers in the case.

*H. J. Coolidge*, for the residuary legatees.

*A. Fiske*, for certain heirs at law of the testatrix.

LATHROP, J. The question in this case is as to the construction to be given to the will and codicils of Susan B. Lyman. The clause more particularly in controversy is the eleventh clause of the third codicil, which is as follows: "I hereby revoke the residuary clauses in my will and codicils, and in lieu thereof I hereby give all the rest and residue of my estate remaining after the payment of the specific legacies provided in my will and the several codicils thereto, as follows: One third thereof

Digitized by Google

to my nephew Joseph Randolph Coolidge. One third thereof to my nephew Algernon Sidney Coolidge. One sixth thereof to my nephew Thomas Jefferson Coolidge. And one sixth to my niece, Ellen Randolph Dwight, wife of Edmund Dwight."

The will is dated September 30, 1871, and the three codicils are dated respectively October 6, 1871, September 23, 1878, and April 12, 1893. The testatrix died in December, 1898, and Mrs. Dwight died, without issue, before her.

The only question is whether the share of Mrs. Dwight goes to the surviving residuary legatees or is to be treated as intestate estate, in which case the surviving nephews mentioned in the residuary clause would take one half of the share Mrs. Dwight would have been entitled to if living, and the other next of kin would take one half in certain proportions, they being a great-nephew, two great-nieces, and one great-great-niece. It was agreed at the argument that the four persons named in the eleventh clause were children of a brother of the testatrix.

It seems to us very clear that, taking the eleventh clause by itself, the gift was not to the persons named as a class, but to each of those persons in a certain proportion. There was no survivorship, and the share of one dying before the testatrix would pass as intestate estate. *Sohier* v. *Inches*, 12 Gray, 385, 387. *Lombard* v. *Boyden*, 5 Allen, 249. *Stratton* v. *Physio-Medical College*, 149 Mass. 505, 509. *Frost* v. *Courtis*, 167 Mass. 251. *Powers* v. *Codwise*, 172 Mass. 425. See also *Smith* v. *Haynes*, 111 Mass. 346; *Upham* v. *Emerson*, 119 Mass. 509; *Barber* v. *Barber*, 3 Myl. & Cr. 688; *Boulcott* v. *Boulcott*, 2 Drew. 25; *Bain* v. *Lescher*, 11 Sim. 397.

The third codicil, however, begins by referring to the will and the first and second codicils, and then follows this clause: "which will and first and second codicils I hereby ratify and confirm in all respects save as the same are changed by this instrument." The will contained a residuary clause, as did also the second codicil, and these clauses are clearly revoked by the eleventh clause of the third codicil; but the testatrix, in the second codicil, after providing that in case of the death of certain legatees before her, the legacies given to them by the will shall be paid to their respective legal representatives, proceeds as follows: "I further direct that if any of the other legatees

Digitized by Google

named in my will or codicils thereto shall die before my decease, the legacies therein given shall lapse, and the amount thereof shall be included in the residue of my estate."

The question is then presented whether the clause last cited includes residuary legatees as well as specific legatees. If it does, then it is difficult to see why it is not *pro tanto* repealed by the first sentence of the eleventh clause of the third codicil. However this may be, it seems to us reasonably clear that the language used in the second codicil relates to the specific legacies given by the will and codicils, and not to the residuary estate. The words used show that the testatrix had in mind something outside of the residuary estate which was to fall into it.

No doubt the will and codicils are to be taken and construed together, as parts of one and the same instrument, speaking the language of the testatrix at the time of her death. *Gray* v. *Sherman*, 5 Allen, 198, 199. *Richardson* v. *Willis*, 163 Mass. 130. But where a legacy lapses which is part of the residue, it cannot, according to our decisions, fall into the residue because it is itself a part of the residue, and it must pass as intestate estate. *Sohier* v. *Inches* and *Lombard* v. *Boyden*, *ubi supra*.

We are therefore of opinion that the portion which Mrs. Dwight would have taken if she had survived the testatrix is not a part of the residue of the estate, but passes as intestate property. *Decree accordingly.*

---

CAUSTEN BROWNE & another *vs.* ALFRED T. TURNER & others.

Suffolk. January 22, 1900. — March 28, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Boston Subway — Construction of Tunnel to East Boston — Constitutional Law.*

Section 17 of St. 1897, c. 500, authorizing the construction of a tunnel from Boston to East Boston and the execution of a lease of the tunnel, when completed, to the Boston Elevated Railway Company, for twenty-five years from the date of that act, at the rental specified in the same section, and § 18 of the same

Digitized by Google

statute, authorizing the city treasurer to issue bonds of the city to pay the cost of construction of the incline, etc., and other bonds to a certain amount, the proceeds thereof and of $7,000,000 in bonds authorized by St. 1894, c. 548, to be applied to the payment of the expenses of constructing, etc. the subways authorized by said St. 1894, c. 548, § 25, and of the tunnels, etc. provided for in the preceding section, are not unconstitutional, as calling for an unwarranted exercise of the power of taxation, as taking the property of the city without reasonable compensation or due process of law when a lease, as provided by statute, is executed to the Boston Elevated Railway Company, or as impairing the obligation of a contract already made by the Boston Transit Commissioners with the West End Street Railway.

BILL IN EQUITY, filed November 21, 1899, under St. 1898, c. 490, by ten taxable inhabitants of Boston, to restrain the Boston Transit Commission from constructing a tunnel from the city proper to East Boston, which they were directed to build by St. 1897, c. 500, § 17; and praying that the commission and the city treasurer be restrained from issuing bonds of the city to pay for such construction, and from using for that purpose the proceeds of bonds already issued, as provided in St. 1897, c. 500, § 18, and for general relief.

The provisions of § 17 are substantially as follows: Whenever the corporation is authorized to construct its railroad as provided in § 13 of this act the transit commission is to construct a tunnel or tunnels for two railway tracks with approaches and other facilities, etc., and for the running of railway cars therein "from a point on or near Hanover Street in the city of Boston, or such other point or points as said board may deem proper for a suitable connection with the subway or subways provided for" in St. 1894, c. 548, § 25, "to a point at or near Maverick Square in that part of Boston called East Boston, where a suitable connection with surface tracks may be made," the tunnel or tunnels to be thoroughly constructed, to be water tight, or in case of leakage the water to be taken care of by the city. On completion the commission is to execute a lease to the Boston Elevated Railway Company for a term expiring twenty-five years from June 10, 1897, the date of the act, "at an annual rental equal to three eighths of one per cent of the gross receipts for each year ending September 30, of all lines owned, leased, or operated by said corporation [Boston Elevated Railway Company], to be paid to said city on or before the last day of November in each year, with the privilege to the lessee to sublet the same,

Digitized by Google

such lease to contain such other terms and provisions as may be agreed on by said commission and said corporation, or in case of disagreement, as shall be determined by the board of railroad commissioners. Said rental shall be in full compensation for the exclusive use of said tunnel by said corporation, its sublessees, successors, or assigns." The city is to collect from each person passing through the tunnel a toll of one per cent with provisions as to the reduction thereof, and the whole amount of tolls and rentals is pledged to the payment of the bonds.

The material provisions of § 18 are as follows: The treasurer of the city shall on the request of the transit commission issue and sell by public or private sale bonds of the city to the amount required to pay the cost and expenses of constructing the incline, etc. provided for in § 5 of the act, and of any alterations in subways required under the lease of the subway made by the commission with the West End Street Railway Company, and shall further issue bonds to the amount of $500,000, not to be included in determining the limit of indebtedness of the city, and the proceeds thereof and the proceeds of the $7,000,000 in bonds authorized by St. 1894, c. 548, to be applied to the payment of the costs and expenses of constructing, etc. the subways authorized by St. 1894, c. 548, § 25, and of the tunnels, etc. provided for in the preceding section.

The West End Street Railway Company and the Boston Elevated Railway Company were joined as defendants; the former, because on December 7, 1896, the transit commission, acting for the city of Boston by legislative authority, entered into a contract with the West End Street Railway Company, granting to it the use of the tunnel; and the Boston Elevated Railway Company, because it is the assignee of this contract.* *Lathrop*, J., at the request of the parties, reserved the case on the bill, demurrers, answers, agreed facts, and certain exhibits annexed for the consideration of the full court. The facts appear in the opinion.

*N. Matthews, Jr. & H. L. Harding*, (*W. G. Thompson* with them,) for the plaintiffs.

* The statutes which create the transit commission and provide for the construction of subways in Boston and for a tunnel to East Boston are Sts. 1893, c. 478; 1894, c. 548; 1895, c. 440; 1896, c. 492; 1897, cc. 347, 500.

Digitized by Google

*T. M. Babson*, for the city of Boston.

*S. Lincoln*, for the Boston Transit Commission.

*A. E. Pillsbury*, for the Boston Elevated Railway Company and the West End Street Railway Company.

HOLMES, C. J. This bill purports to be brought under St. 1898, c. 490, amending Pub. Sts. c. 27, § 129. As we are of opinion that it fails to make out a case, and as all parties are anxious for a decision upon the merits, we have not considered whether the plaintiffs bring themselves within the purview of the act. The decree will be the same that it would be if we were against them on the preliminary point, and therefore there seems to be no objection to stating the grounds of substantive law which seem to us to support the result.

The point of the bill may be stated in a few words. The Boston Transit Commission proposes to obey St. 1897, c. 500, § 17, by constructing a tunnel from a point on or near Hanover Street in Boston proper to a point at or near Maverick Square in East Boston, and by executing a lease of the tunnel, when completed, to the Boston Elevated Railway Company, for twenty-five years from the date of that act, at the rental specified in the same section. The treasurer of the city proposes to obey § 18 of the act by selling bonds and applying the proceeds to the payment of the cost of the tunnel. The plaintiffs seek an injunction on the ground that the requirements of these sections are unconstitutional, as calling for an unwarranted exercise of the power of taxation, as taking the property of the city without reasonable compensation or due process of law when the lease is executed, and as impairing the obligation of a contract already made by the subway commissioners with the West End Street Railway.

In view of the decisions as to the subway, it does not appear to us to need further argument to show that the contemplated tunnel, even if permanently confined to street railway travel, is a public work for a public use, for building which the Legislature can require the city to pay. *Prince* v. *Crocker*, 166 Mass. 347, 361. *Mahoney* v. *Boston*, 171 Mass. 427, 429. Local precedent is more important than abstract theory in determining this question, at least so far as the State Constitution is concerned; and if it be true, as it may be, that the difference between uses which are public within the requirements of the

Digitized by Google

Constitution and those which are not is one of degree, that is no novelty, and it is enough that this use has been determined to fall on the right side of the line. Apart from the distinctions suggested between the subway and the tunnel, which do not impress us, it is said that, because of the direction to let the tunnel, and because of the difference between the rental under the statute and that which would have been received under the contract which we have mentioned, the real object of the statute is to throw upon the city the burden of constructing part of its roadbed for a private corporation and to give it a lease on easier terms. We cannot accept the suggestion. It does not appear that the statute will have either effect. But if it will, so long as it is possible we are bound to assume that the Legislature did its duty, meant what it said, and regarded the work as a public work really needed by the public, as it may be. The purpose of the act on its face is to create a lawful public improvement.

The lease comes up in another aspect, however. It is said that the compensation to the city is inadequate, and that the lease will be a taking of the city's property for a private corporation without paying for it. *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509. With regard to the former proposition, if the Legislature has the same power that it has with regard to other roads, the matter of compensation is wholly within its power. *Norwich* v. *County Commissioners*, 13 Pick. 60. *Agawam* v. *Hampden*, 130 Mass. 528, 530, 531, and cases elsewhere in this judgment. See also *Mobile* v. *Kimball*, 102 U. S. 691, 702; *Williams* v. *Eggleston*, 170 U. S. 304. Commonly, when a city or town is required to build a road or bridge within its limits, no compensation is provided for beyond the local benefit of having it there. With regard to the latter branch of the objection, we are of opinion that the case is not like *Mount Hope Cemetery* v. *Boston*, or that supposed of an act requiring a transfer of the city hall to a railroad company for a station. This is not a transfer, but only a temporary and *quasi* experimental lease for a not unreasonable time. The property of the city in the tunnel, assuming it to have a property, is not of a half private sort, as in case of a cemetery, but is merely the control of a public agency. There is no element of the Mount Hope Cemetery case about the matter. *McHugh* v. *Boston*, 173 Mass. 408. *Commonwealth*

Digitized by Google

v. *Fitzgerald*, 164 Mass. 587, 589, 590. *Kingman, petitioner*, 153 Mass. 566, 574, 575. *Cheshire* v. *Adams & Cheshire Reservoir Co.* 119 Mass. 356. As was said at the argument, if the tunnel is to be built it is to be used, and naturally will not be used by the city directly. If the Legislature could authorize it to be let on terms to be agreed upon, as was held in *Prince* v. *Crocker*, it could require it to be let upon terms which the Legislature thought just, to a corporation selected by itself engaged in a public work like that for which the tunnel is to be used. In fact, when once the power to require the tunnel to be built is conceded, the rest follows, in the situation now existing in Boston. Assuming that the city is not to go into the transportation business further than it has gone, the use of the tunnel by the corporation which manages the consolidated street railways of the city is the alternative, and such use is not to be expected without a lease.

The contract the obligation of which it is said will be impaired is the former lease of the subway executed by the transit commissioners under Sts. 1893, c. 478; 1894, c. 548; 1895, c. 440; and 1896, c. 492. This lease was to the West End Street Railway Company, to whose rights the Elevated Railway Company has succeeded, but was at a different rental from the present. The lease declares the word "subway" as used therein to include all the subways, tunnels, etc., which the commission has constructed or may construct under the aforesaid acts. As to future tunnels, of course this is not a lease but only a contract to let them if they are built under the said acts. The Statute of 1894, c. 548, § 26, was to the effect that the commission "may construct a tunnel . . . from a point on or near Scollay Square in the city of Boston, . . . to a point on or near Maverick Square." Such a contract is not impaired in any way by a repeal of so much of the act as gives the commission authority to build, and it may be that, if it were necessary, we should say that a tunnel with a different terminus built in form under another and later act is not within the words of the lease,— that, in the words of *Browne* v. *Turner*, 174 Mass. 150, 160, the contemplated tunnel is "a substitute for the tunnel authorized by St. 1894." We prefer, however, to put our decision on more substantial grounds. The railroad company does not ob-

Digitized by Google

ject to the change, as was the case in *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1. The city has no greater interest in the lease than it has in the tunnel. Its interest in the lease is as much public property and as subject to legislative control as its interest in the tunnel. No part of the proceeds go to its private uses, (St. 1894, c. 548, § 38; *Mahoney* v. *Boston*, 171 Mass. 427, 430,) and if any part did go to such uses it is hard to see how, as against itself, the city, by making a contract to let public property held by it subject to the control of the Legislature, could cut down this control. The control is not subject to the chance of the city's contracting, but the contract is subject to the power of the Legislature over the subject matter. *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334, 339, 340. *New Orleans* v. *New Orleans Water Works Co.* 142 U. S. 79, 91, 92. *Chicago, Burlington, & Quincy Railroad* v. *Nebraska*, 170 U. S. 57, 72. *Railroad Co.* v. *Ellerman*, 105 U. S. 166. See *Brighton* v. *Wilkinson*, 2 Allen, 27; *Brimmer* v. *Boston*, 102 Mass. 19; *Agawam* v. *Hampden*, 130 Mass. 528, 530, 531 *et seq.* We assume, for purposes of discussion, without deciding, that the contract as to future tunnels was within the authority given by St. 1895, c. 440, § 6; St. 1896, c. 492. *Bill dismissed.*

---

ALBERT F. SMALL *vs.* CITY OF BROCKTON.

Plymouth. March 7, 1900. — March 28, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Eminent Domain — Damages — Taking without Injury to Petitioner.*

A petitioner to recover damages for the taking by the respondent city under the St. of 1888, c. 309, of his dam, water rights, and other real estate, having conveyed his dam to the respondent, which the respondent may at any time take down, has lost the means of flowing the lands above, and the taking has done him no injury.

PETITION, to recover damages for the taking by the respondent, under the St. of 1888, c. 309, of his dam, water rights, and other real estate. At the trial in the Superior Court, before

Digitized by Google

*Lilley*, J., the petitioner made certain offers of proof, and put in evidence the reports of an auditor. The judge thereupon directed a verdict for the respondent. If the direction was right, the verdict was to stand; otherwise, the verdict was to be set aside and a new trial ordered. The facts appear in the opinion.

*G. C. Abbott*, (*R. Lund* with him,) for the petitioner.

*H. Kingman*, for the respondent, submitted the case on a brief.

LATHROP, J. By the St. of 1888, c. 309, § 1, the city council of Brockton was given the right to adopt a system of drainage. By § 2, the board of mayor and aldermen of the city was empowered, for the purpose of surface drainage, within the limits of the city, to alter, change, widen, straighten, and deepen the channels of any brooks or natural streams, and to take and hold, by purchase or otherwise, such lands, water rights, dams, easements, or other real estate within the limits of the city, as said board of mayor and aldermen might adjudge necessary.

The petitioner was the owner of certain land, including a mill and dam across a natural stream, and of certain water rights connected therewith. On June 30, 1892, he entered into an agreement under seal with the respondent, by the terms of which he, in consideration of $25,000, covenanted to convey to the respondent a certain parcel of land described by metes and bounds, "together with any and all rights which I now own to flow any lands the surface of which is below the level of my dam." The petitioner reserved an island in the pond, and some land included in the premises described.

On July 1, 1892, the board of aldermen took the premises which the petitioner agreed to convey, together "with the right and the easement to flow all lands covered by said waters thereby, and all other water rights of flowage appurtenant to and connected therewith, meaning and intending hereby to include all the water privilege and rights of flowage owned by the late Chandler Sprague."

On July 15, 1892, the petitioner, in consideration of $25,000, released to the respondent by a quitclaim deed the land and water rights described in the agreement of June 30.

It appears that the dam was included in the land conveyed to the respondent, and that the dam was thirty-two inches high

Digitized by Google

above the sill; and that in the spring and other seasons of high water, the water had been raised by means of the dam eleven and one-half inches above the rest of the dam.

The contention of the petitioner is that as he agreed to convey and did convey only his water rights to the level of the dam, he has lost by the taking the right to flow the land above, which he had by virtue of the eleven and one-half inches of water. But the only means which the petitioner had of raising the eleven and one-half inches of water was his dam, which he conveyed to the respondent, and which the latter might, at any time, take down. If, as he contends, he has lost the right to sell to upper riparian proprietors his right of flowage, it is in consequence of his own act in conveying the only means which he had to flow their lands. And we see no ground upon which this petition can be maintained. *Verdict to stand.*

---

## COMMONWEALTH *vs.* FREDERICK H. BARROWS.

Suffolk. March 13, 1900. — March 28, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Indictment — Abortion — Evidence — Argument of District Attorney to Jury.*

At the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman and for causing her death, certain cards found in the defendant's trunk in the room occupied by him tending to show that he held himself out as a person whose business it is to procure abortions, although not stating the fact in precise terms, are admissible in evidence against him; and the District Attorney is properly allowed to argue to the jury what their meaning is.

INDICTMENT, for an unlawful attempt to procure the miscarriage of a woman and for causing her death. At the trial in the Superior Court, before *Gaskill*, J., the government offered certain cards which were found in a room occupied by the defendant, in the defendant's trunk, copies of which are as follows:

"3 to 5 P.M. 7 to 9 P.M. F. H. Barrows, magnetic treatments, female irregularities a specialty. 925 Washington St., appointments by mail. Boston."



Digitized by Google

"F. H. Barrows, magnetic and electric treatments, for all female weaknesses, leucorrhœa, suppressions, cancer, tumor, etc., 972 Washington St., Boston."

The judge, against the defendant's objection and exception, admitted the cards in evidence.

The District Attorney argued to the jury that the cards advertised the business of the defendant as that of an abortionist, and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*H. P. Harriman*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth.

LATHROP, J. Two questions only are raised by the bill of exceptions. The first is as to the admission in evidence of certain cards found in the defendant's trunk in the room occupied by him, and the second is allowing the District Attorney to argue to the jury that the defendant, by the cards, advertised his business as that of an abortionist.

The defendant was indicted under the Pub. Sts. c. 207, § 9, for thrusting a certain instrument into the body and womb of one Frances Adams, with intent to cause and procure the miscarriage of said Adams, and for causing her death thereby. In such cases cards and circulars of a defendant have been held to be admissible in evidence if they tend to show that the defendant holds himself out as a person whose business it is to procure abortions. It is not to be expected that cards and circulars of this kind will state the fact in precise terms, or that their meaning will not be more or less disguised.

The advertisements of the defendant in *Commonwealth* v. *Bishop*, 165 Mass. 148, are not stated in the report of the case, but they appear in the bill of exceptions, and are as follows: "Dr. Bailey, 48 Howard Street, may be consulted from nine to nine. No other physician in the city has the same facilities for successful treatment of all female troubles. His method is the only safe, the only sure and harmless one. Board and nurse when necessary." "Dr. Herman, 7 Tremont Row, may be consulted from nine to nine; excels all others in quick and thorough cures of female troubles. Only one visit necessary. Has a

Digitized by Google

remedy will establish periods in two or three days. Useful information to ladies and gentlemen." It appeared that the defendant did business under the name of Dr. Bailey and also under the name of Dr. Herman.

The indictment in *Commonwealth* v. *Bishop* was similar to the one in the case at bar, and it was said by the court that these advertisements, "to say the least, might be understood to hold out that he [the defendant] was ready to do acts of the kind charged." There is no substantial difference between the advertisements in *Commonwealth* v. *Bishop* and the cards in the case at bar. See also *Weed* v. *People*, 3 Thomp. & C. 50; affirmed, 56 N. Y. 628.

We have no doubt that the cards were admissible in evidence; and that the District Attorney was properly allowed to argue to the jury what their meaning was. *Exceptions overruled.*

---

COMMONWEALTH *vs.* JOHN F. MORRIS & others.

Suffolk. March 12, 1900. — March 29, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Statute as to Small Loans and Redemption of Security — Complaint — Penalty — Proof of Offence — "Per Annum" or "For a Year" — Interest — Evidence.*

The St. of 1898, c. 577, relative to small loans and the redemption of the security therefor is not vague, defective, uncertain, and silent upon essential points, and hence void in that § 1 sets out no penalty, and § 10 does not define the offence. The fact that we have to look to other sections of the statute to ascertain the provisions as to a license, and to what loans the statute applies, does not render the statute defective, vague, and uncertain. Section 1 says nothing about a penalty and applies to single loans, while § 10 applies to the engaging in, or carrying on of, the business of making such loans; and the offence alleged must be proved by showing a number of distinct acts of the kind forbidden in § 1.

The contention that the St. of 1898, c. 577, relative to small loans and the redemption of the security therefor, being silent as to the period of time for which the charging of more than twelve per cent is unlawful, is therefore vague and uncertain, is unsound, as the meaning is plain, and the words "per annum" or "for a year" are to be understood; and the language of the complaint must have the

Digitized by Google

same meaning; and the complaint is not defective in not stating the period of time for which interest was to run.

At the trial of a complaint under the St. of 1898, c. 577, relative to small loans and the redemption of the security therefor, it is competent to show that, while the notes and mortgages purported to be at a rate of interest not greater than twelve per cent per annum, the defendant in each instance deducted from the amount set out in the notes and mortgages certain amounts as expenses of making and securing loans, and that the total of these sums, and the interest actually charged and received as interest, were in each instance in excess of twelve per cent per annum and other charges allowed by the statute.

COMPLAINT, to the Municipal Court of the city of Boston under St. 1898, c. 577. Trial in the Superior Court, on appeal, before *Hardy*, J., who overruled certain motions to quash made before the impanelling of the jury; and the defendants excepted.

The jury returned a verdict of guilty against each defendant; and they alleged exceptions. They then filed a motion in arrest of judgment, which was overruled, and they excepted. The nature of all the exceptions appears in the opinion.

*T. W. Proctor*, (*S. R. Cutler* with him,) for the defendants.

*J. D. McLaughlin*, Second Assistant District Attorney, for the Commonwealth.

LATHROP, J. While there are many grounds of objection taken in the court below to the validity of the complaint and the statute upon which it is founded, we shall confine ourselves to those insisted upon at the argument before us.

1. The statute in question is the St. of 1898, c. 577, entitled "An Act relative to small loans and the redemption of the security therefor." The defendants contend that the statute is vague, defective, uncertain, and silent upon essential points, and hence void. In support of this proposition it is urged that the complaint is under §§ 1 and 10 of the act above referred to, and that § 1 sets out no penalty, and § 10 does not define the offence. We agree that § 1 does not set out a penalty, but we do not agree that § 10 does not set out an offence. Section 10 provides: "Any person or persons not being duly licensed as provided in this act who, on his or their own account, or on account of any other person or persons, copartnership or corporation not so licensed, shall engage in or carry on, directly or indirectly, either separately or in connection with or as part of any other business, the business of making loans to which the provisions

Digitized by Google

of this act apply, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the house of correction not more than sixty days, or by both such fine and imprisonment."

The fact that we have to look to other sections of the statute to ascertain the provisions as to a license, and to what loans the statute applies, does not render the statute defective, vague, and uncertain. While § 1 says nothing about a penalty, it does prohibit a person, corporation, or partnership "engaged in the business of making loans" from making "any loan secured by mortgage or pledge of household furniture or other personal property exempt from attachment, or by assignment of wages for personal service, for less than two hundred dollars and at a rate of interest greater than twelve per cent, without first having obtained a license for carrying on such business in the city or town in which such business is transacted." This section applies to single loans, while § 10 applies to the engaging in or carrying on of the business of making such loans. The offence alleged must be proved by showing a number of distinct acts of the kind forbidden in § 1.

It is next contended that the statute is silent as to the period of time for which the charging of more than twelve per cent is unlawful; and that therefore the statute is vague and uncertain. But we are of opinion that the meaning is plain, and that the words "per annum" or "for a year" are to be understood. By the Pub. Sts. c. 77, § 3, it is provided: "When there is no agreement for a different rate, the interest of money shall be at the rate of six dollars upon each hundred dollars for a year." Where a different rate is allowed by statute, it is to be presumed that this is the rate for the year. In the Pub. Sts. c. 27, § 28, authorizing a town buying waterworks to issue in payment therefor bonds bearing interest at a rate not exceeding seven per cent, the words "for a year" are omitted, but no one can doubt what the meaning is.

2. The defendants further contend that whatever may be the meaning of the statute, the complaint is defective in not stating the period of time for which interest was to run. But we are of opinion that if the statute has the meaning we have stated, the language of the complaint must have the same meaning, and that the offence is sufficiently set forth.

Digitized by Google

3. The remaining question is as to the admission of evidence to show that, while the notes and mortgages purported to be at a rate of interest not greater than twelve per cent per annum, the defendants in each instance deducted from the amount set out in the notes and mortgages certain amounts as expenses of making and securing loans, and that the total of these sums, and the interest actually charged and received as interest, were in each instance in excess of twelve per cent per annum, and other charges allowed by the statute. Section 4 of the statute provides that certain sums may, if both parties to the loan so agree, be paid by the borrower or added to the debt, and taken by the lender as the expense of making and securing the loan, and such sum shall not be counted as part of the interest of such loan. The section then provides: "No greater sum than as above specified shall be taken for such purpose, and any sum paid, promised or taken in excess of such sum shall be deemed to be taken as interest, and shall be so considered for the purposes of this act."

It seems to us too clear to require argument that the ruling of the court below in admitting the evidence was right. Any other construction would render the statute futile.

*Exceptions overruled; appeal dismissed.*

---

## INHABITANTS OF WATERTOWN *vs.* COUNTY COMMISSIONERS OF MIDDLESEX.

Middlesex. November 14, 15, 1899. — April 10, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Certiorari — Relocating, Widening, and Laying out Street — Delay and Certain Circumstances making it unjust to quash Proceedings.*

In this case, which was a petition for a writ of certiorari to quash the proceedings of county commissioners in relocating, widening, and laying out a street in one town by taking land within the limits of another town, and by ordering that town to pay for the land so taken and to construct a portion of the street, the delay in bringing the petition and the circumstances occurring between the final order of the respondents and the filing of the petition make it unjust to quash the proceedings.

Digitized by Google

PETITION, for a writ of certiorari, to quash the proceedings of the respondents in exceeding their authority in locating Belmont Street and in laying out the same by taking land lying within the limits of the town of Watertown, and by ordering the town of Watertown to pay for the land so taken and to construct a portion of the street, the petition alleging that the proceedings and the relocating, widening, and laying out were wholly erroneous. Hearing before *Knowlton*, J., who reserved the case for the consideration of the full court. If the proceedings showed such error of law as to entitle the petitioner to the writ, it was to issue; otherwise the petition was to be dismissed. The facts appear in the opinion.

*H. M. Knowlton & J. E. Abbott*, for the petitioner.

*F. Dodge & G. S. Selfridge*, for the town of Belmont.

BARKER, J. As both the streets were highways and formed together a continuous highway, the respondents had jurisdiction to alter, widen, and straighten them, and to locate their new bounds. This power has been in the county commissioners since that tribunal was established by St. 1827, c. 77. See St. 1827, c. 77, § 7; Rev. Sts. c. 24, §§ 1–5; Gen. Sts. c. 43, §§ 1–7; Pub. Sts. c. 49, §§ 1–7. Under this jurisdiction the commissioners can widen, narrow, straighten, and change the grade of any highway. *Goodwin* v. *Marblehead*, 1 Allen, 37, 39, and cases cited. *Cutter* v. *Cambridge*, 6 Allen, 20. *Bowley* v. *Walker*, 8 Allen, 21. *Bemis* v. *Springfield*, 122 Mass. 110, 116. See also *Richards* v. *County Commissioners*, 120 Mass. 401. That a highway is wholly within a single town is immaterial. *Commonwealth* v. *County Commissioners*, 8 Pick. 343. *Goodwin* v. *Marblehead*, 1 Allen, 37, 39. *Blackstone* v. *County Commissioners*, 108 Mass. 68. It has been held that a highway may be located upon both sides of the division line between two towns, in such a manner that one side of the way is in one town and the other side of the way in another town. *Commonwealth* v. *Stockbridge*, 13 Mass. 293. It follows from these decisions that the commissioners may so widen a highway that the division line between two towns will be within the limits of the widened way. Therefore the respondents had power, under proper proceedings, to straighten and to alter and widen Belmont Street by making land in Watertown a part of the altered

Digitized by Google

highway, notwithstanding the fact that before the action of the commissioners the street was wholly within the town of Belmont, and that one of the lines of the street coincided for a long distance with the division line between the towns of Belmont and Watertown.

It is contended, however, by the inhabitants of Watertown that the respondents had no jurisdiction to widen or to deal with the highway upon the petition under which they proceeded. Existing ways, whether highways or laid out by the authority of the town, within a town may be located anew by county commissioners under jurisdiction conferred by a different provision from those already cited, and it is contended that the petition on which the respondents acted was addressed to the power which is given them by this different provision, and that that power did not authorize them to deal with the highway. The different provision referred to is Pub. Sts. c. 49, § 13, and is in these words:

"When application is made to the commissioners by a town, or by five inhabitants of a town, to locate anew a road within such town, whether the same was laid out by the authority of the town or otherwise, they may, either for the purpose of establishing the boundary lines of such road or of making alterations in the course or width thereof, locate it anew, after giving like notice and proceeding in the manner prescribed in laying out highways. The expense shall be assessed upon the abutters, or upon the petitioners, or upon the town or county, as the commissioners may order."

The contention is that this language does not give the commissioners jurisdiction to locate anew a highway which lies next to the division line between the town in which the highway is and an adjoining town, and that the petition is a petition to locate anew under this statute provision.

The most natural meaning of the words "to locate anew a road within such town" is not that the new location must be within such town, but that the road as it exists when the application to locate anew is made must be within the town. Very likely neither the Legislature which originally made the provision nor any of those which have since re-enacted or amended it considered the question of its applicability to a road situated

Digitized by Google

like Belmont Street. If a way so situated was to be dealt with under the provision, it would be unwise to restrict the commissioners to changes to be made upon one side of the way only; for there is no good reason why a way so situated should not be so laid as best to serve the public convenience. The provision applies to town ways as well as to highways. The town and its officials have no power to make a town way except in their own town. If, therefore, town ways adjoining town lines were common, it would be reasonable to give to county commissioners the power to locate them anew without regard to town lines, so that the travel might be the better accommodated. As at first enacted the provision placed all the expense upon the petitioning town, although it now may be assessed upon the petitioners, the abutters, the town, or the county as the commissioners may order. It would be anomalous, though we do not see that it would under all circumstances be unjust, to make one town pay the whole expense of a road laid out partly in another town. The abutters, on whom the expense may be assessed, would, in case of a way so located anew as to be in two towns, be charged in respect of lands in their own towns. The town upon which the expense may be assessed would seem to be only the town which can petition, or whose five inhabitants can make the application; namely, the town within which the road is when the application is made. On the other hand, a road situated as Belmont Street was situated when the petition of February, 1898, was made to the respondents, is a road entirely within one town; and so is within the language of the section. If, as would seem to be improbable, that town, or five of its inhabitants, should see fit to ask county commissioners to locate anew such a road under Pub. Sts. c. 49, § 13, rather than to alter it under the other branch of the statute, it is difficult to give any good reason why the commissioners would not have jurisdiction so to do.

There is nothing in the history of the legislation which militates against this view. The statutes have been St. 1835, c. 152, § 8; Rev. Sts. c. 24, § 9; St. 1851, c. 214; Gen. Sts. c. 43, § 12; St. 1873, c. 165; Pub. Sts. c. 49, § 13. The first of these provisions is part of the act which changed the office of county commissioner into an elective office. Under St. 1786,

Digitized by Google

c. 67, § 4, the court of sessions had jurisdiction to alter any highway. This power was transferred to commissioners of highways appointed by the governor in the several counties by St. 1825, c. 171, § 2. It was again transferred to county commissioners upon their establishment as officers appointed by the governor for the several counties by St. 1827, c. 77. See St. 1827, c. 77, §§ 4, 7; St. 1828, c. 103, § 3. When the Legislature by St. 1835, c. 152, made the office of county commissioner elective, it also, by §§ 7 and 8 of that statute respectively, authorized the commissioners to order specific repairs upon an existing highway when asked to lay out or alter a highway in the same manner as is now provided by Pub. Sts. c. 49, § 10, and upon the petition of a town to locate anew any road or roads within the town, whether laid by the authority of the town or of the county, either for the purpose of establishing the bounds, or of making any alterations in the route or width, all of the expenses to be paid "by the town making the application." St. 1835, c. 152, § 8. This provision, with only verbal changes, was continued in Rev. Sts. c. 24, § 9, and in the same chapter were also continued the general authority to county commissioners to alter highways and to make specific repairs. §§ 1–7. In 1851 any five inhabitants of a town were authorized to apply to the commissioners to locate anew a road within their town, the persons making the application to pay all the expense. St. 1851, c. 214. The commissioners who reported the General Statutes consolidated in one section Rev. Sts. c. 24, § 9, and St. 1851, c. 214. See Commissioners' Report, c. 43, § 12. This was amended by the Legislature so as to allow the expense to "be assessed upon the petitioners, or upon the town or county, as the commissioners order." Amendments to Commissioners' Report (1859), c. 43, § 12 (No. 8). Chapter 43, § 12, of the Commissioners' Report and the amended provision became Gen. Sts. c. 43, § 12. The general provisions giving the commissioners power to alter all highways and to make specific repairs were continued in the same chapter. See Gen. Sts. c. 43, §§ 1–4, 8. The last change in this provision was made by St. 1873, c. 165, which authorized the commissioners to order the expenses to be assessed upon the abutters. As so amended this provision as well as those which gave the commissioners

Digitized by Google

authority to alter any highway and to order specific repairs have been since continued in force. Pub. Sts. c. 49, §§ 1–6, 10, 13. They are, therefore, to be construed as parts of a system which, as has been said, clothes the commissioners with extensive discretionary powers. *Blackstone* v. *County Commissioners*, 108 Mass. 68.

The principal decisions in which the statutes now consolidated in Pub. Sts. c. 49, § 13, have been considered are these: *Whately* v. *County Commissioners*, 1 Met. 336, 343; *State Lunatic Hospital* v. *Worcester*, 1 Met. 437; *Hadley* v. *County Commissioners*, 11 Cush. 394; *Damon* v. *Reading*, 2 Gray, 274; *Barnes* v. *Springfield*, 4 Allen, 488; *Hobart* v. *Plymouth*, 100 Mass. 159; *Stockwell* v. *Fitchburg*, 110 Mass. 305, 309; *Blake* v. *County Commissioners*, 114 Mass. 583, 587; *Hyde Park* v. *County Commissioners*, 117 Mass. 416; *Richards* v. *County Commissioners*, 120 Mass. 401; *Tufts* v. *Somerville*, 122 Mass. 273; *Foster* v. *Park Commissioners*, 133 Mass. 321, 332; *Dean* v. *Lowell*, 135 Mass. 55; *Chandler* v. *Railroad Commissioners*, 141 Mass. 208, 211; *Brigham* v. *Worcester*, 147 Mass. 446; *Lincoln* v. *Warren*, 150 Mass. 309; *Cambridge* v. *Railroad Commissioners*, 153 Mass. 161, 167; *Taft* v. *Commonwealth*, 158 Mass. 526, 550; *Lincoln* v. *Commonwealth*, 164 Mass. 1, 9; *Lexington* v. *County Commissioners*, 165 Mass. 296; *Cambridge* v. *County Commissioners*, 167 Mass. 137. See also *Bigelow* v. *Worcester*, 169 Mass. 390, 393.

None of these cases are decisive of the question whether a highway situated as Belmont Street was situated can be located anew under the provisions of Pub. Sts. c. 49, § 13. In *Tufts* v. *Somerville*, 122 Mass. 273, in which it was held that assessments under the betterment statute of 1871, c. 382, could not be laid for betterments resulting from proceedings under Gen. Sts. c. 43, § 12, it was said that the Legislature has treated the subject of locating a road anew as distinct from that of laying out, altering, or discontinuing; and that the purpose of locating anew is mainly to establish the boundary lines of a road which are in doubt or dispute; and the opinion in that case points out that the rules applied to locating anew by St. 1835, c. 152, § 8, and the subsequent statutes governing such proceedings, are different from those which govern the laying out, altering, or dis-

Digitized by Google

continuing highways. These differences, assuming that St. 1887, c. 124, has not changed the rule as to betterments in cases of technical locating anew under Pub. Sts. c. 49, § 13, are that while the commissioners can alter a highway upon the petition of any party, they can locate anew only upon the petition of the town within which the highway is or of inhabitants of that town, and that the land damages and other expenses are to be assessed by the commissioners upon the abutters, or upon the petitioning inhabitants of the town within which the way is, or upon that town, or upon the county, and also that the provisions of the general betterment laws do not apply. When a highway is altered under the other branch of the statute, the land damages are to be paid by the county, the way may be laid under the betterment laws, the expenses, except land damages, are to be met in the first instance by the towns in which the work of construction is to be done; and when those towns have completed the work to the acceptance of the commissioners, such sums may be paid to them from the county treasury as the commissioners may order.

It has been decided that in construing the return of county commissioners to a writ of certiorari such a meaning shall be given to it "as appears substantially and by fair interpretation, taking the whole instrument together, to have been intended by them." *Goodwin* v. *Marblehead*, 1 Allen, 37, 40. The same rule should be applied in construing their answer to a petition for the writ, and in determining under which branch of their authority they have acted in the proceedings which the petition for certiorari calls in question.

Considering the situation and characteristics of the highway with which the respondents have dealt, the different rules which apply to and govern the alteration of a highway under Pub. Sts. c. 49, § 1, and the technical locating anew of a highway under Pub. Sts. c. 49, § 13, the form of the petition upon which the respondents acted, the steps which they pursued, the adjudications and orders which they passed, and the circumstances disclosed by the record before us, have they attempted to alter the highway by widening and straightening it, under the general power given them by Pub. Sts. c. 49, § 1, or have they attempted to locate it anew under the more limited and peculiar provisions of Pub. Sts. c. 49, § 13?

Digitized by Google

As was said in *Tufts* v. *Somerville*, *ubi supra*, the main purpose of locating anew is to establish the boundary lines of a road which are in doubt or dispute. The town of Belmont was incorporated so late as the year 1859. It would be surprising if that boundary line of Belmont Street, which was also the division line between Watertown and Belmont, had become a matter of doubt or dispute. On the other hand, it would be probable that the growth in population participated in during recent years by all the territory in the neighborhood of Boston had made such an increase in travel and had so changed the nature of the travel seeking to use Belmont Street and North Street as to make it a matter of common convenience and necessity that those highways should be straightened and widened, their grades changed, and the streets adapted to the present use of the public.

Neither the town of Belmont, nor any inhabitants of that town, nor any inhabitants of Watertown would be expected to ask the commissioners to make costly changes in Belmont and North Streets in such a way that the commissioners could assess the whole expense of them upon Belmont, or upon the individuals who made the petition. Individual inhabitants of Watertown would not be expected to join in a petition which, if for locating anew under Pub. Sts. c. 49, § 13, could be made only by inhabitants of Belmont, within which town the highway was, or by that town. All these circumstances point to a request for the alteration of the highway rather than to one for locating it anew. While the proceedings were pending, five other petitions of the same tenor as the first were presented to the respondents, signed by fifty-six inhabitants of Watertown and by two other persons described as owners of property lying in Watertown.

The original petition, made by thirteen inhabitants of Belmont and by six inhabitants of Watertown, was the one on which the proceedings were had. It does not specify Pub. Sts. c. 49, § 13, as the statute under which it is preferred. After representing that Belmont Street and North Street "are uncertain in their boundaries, of insufficient width and in need of relocation, widening and general revision," it prays that the commissioners "will cause said Belmont and North Streets to

Digitized by Google

be relocated or located anew, widened and straightened in such manner as your honorable board may deem proper and expedient after due proceedings in accordance with the provisions of the Public Statutes and any amendments thereof."

The first step taken by the respondents was to order notice to all persons and corporations interested that the respondents would meet at a time and place stated to view the premises and hear the parties, to be served by serving a copy of the petition and of their order upon the town clerks of Belmont and Watertown, by publishing the petition and order in a newspaper printed at Watertown, and by posting copies of the petition and order in two public places in each of the towns of Belmont and Watertown. This order of notice was precisely that required if the respondents were acting under their general authority to alter highways, while upon the construction of Pub. Sts. c. 49, § 13, now contended for by the present petitioner, the service of notice upon the town clerk of Watertown and the posting of copies of the petition and order in two public places in that town were unnecessary. See Pub. Sts. c. 49, § 3. This, however, is of but slight significance or none at all if, as we are inclined to think, the respondents in making a technical "locating anew" of the highways under Pub. Sts. c. 49, § 13, had power to so widen or straighten the highways as to put some part of the way as they should locate it anew in the town of Watertown.

The next step in the proceedings consisted of the view, the hearing, and the adjudication of common convenience and necessity, which adjudication seems to have been in these words, "that said relocation is of common convenience and necessity." The expression used is neither the technical "locate anew" of Pub. Sts. c. 49, § 13, nor the comprehensive "altered" of Pub. Sts. c. 49, § 1. Perhaps the respondents may have used the words "said relocation" to refer to the whole prayer of the petition, that the streets "be relocated or located anew, widened and straightened." Their subsequent action under the adjudication is as consistent with this view as with any other. How much uncertainty there in fact was about the boundaries of the highways it might be interesting to know. The petition for certiorari and the agreed facts are silent upon the point, and all

Digitized by Google

that we have are the general statements of the petitions to the respondents and the respondents' answer in this case, which alleges that they found and determined that the streets "were uncertain in their boundaries, of insufficient width and in need of relocation, widening and general revision."

The next step after the adjudication of common convenience and necessity was the making of an order giving notice that upon the petition for the relocation of Belmont and North Streets in Belmont the respondents had adjudged "that said relocation is of common convenience and necessity," and that they would meet, at a time and place stated, "to locate accordingly." This meeting was notified by serving the town clerks of the two towns each with a copy, by posting a like copy in two public places in each of the towns, and by publishing a like copy in a newspaper published in Watertown. This notice again was that which would be required upon the alteration of the highways under Pub. Sts. c. 49, § 1.

In accordance with this notice the respondents proceeded to take their final action. Their return states that they "proceeded to relocate said Belmont and North Streets as prayed for in said petition," and then gives a particular "description of said streets as hereby laid out and ordered." The technical words "locate anew" are not used, though the respondents may have thought that "relocate" was equivalent to them. The expression "as hereby laid out and ordered" would be appropriate in proceeding under Pub. Sts. c. 49, § 1. Following this description, which consists in defining what are called the new lines of the streets, comes an order to the town of Belmont to lay open, construct, and complete so much of Belmont street as lies within that town, and also to do the same with North Street; and next an order to the town of Watertown to lay open, construct, and complete so much of Belmont Street as lies in Watertown. Land damages to the amount of $7,493 are assessed to the proprietors of lands "over which said highways are thus laid out." Then follow orders that Belmont and Watertown respectively shall pay all land damages in excess of these awards for land taken in the respective towns, and that the damages assessed by the respondents shall be paid out of the treasury of the town in which the land lies. Then the return recites that the "commissioners

Digitized by Google

further order that the highways described in said return be, and the same is hereby established as and for a public highway, and that the same be recorded to the end that the same may hereafter be known as such." Then follows an order determining that $4,000 "is a just and fair proportion of the expenses of said alterations" to be paid out of the county treasury to Belmont and $2,000 "a just and fair proportion of the expenses of said alterations" be so paid to Watertown. Finally the commissioners "declare the highways described in this return laid out under the provisions of law authorizing the assessment of betterments."

This summary of the final action of the respondents does not wholly dissipate the doubt as to whether they thought they were proceeding under their general authority to alter highways, or under the power to locate anew given by Pub. Sts. c. 49, § 13. They do not use the technical words "locate anew" in which the power given by the section last cited is conferred. They use the word "relocate" with a reference to the petition as defining it, as in their preliminary adjudication as to common convenience and necessity, and they also use the words "laid out" in giving the description of the way as it purports to be made by their order, and in awarding the land damages, and in providing for their payment by the towns, and they speak of the "said alterations" and of "said location" in their order for the repayments out of the county treasury to the towns. They do not assess all the expenses upon the abutters, the petitioner, the town of Belmont, or the county, as is required in case of a technical locating anew. On the other hand, they order the land damages to be paid by the towns, while in case of the laying out or the alteration of a highway under Pub. Sts. c. 49, § 1, those damages must be paid by the county. Pub. Sts. c. 49, § 58. But they determine that the betterment act shall apply, which cannot be done if they were proceeding under their authority to locate anew. While, as in the petition considered in *Hyde Park* v. *County Commissioners*, 117 Mass. 416, the word "relocate" may well be held to confer jurisdiction under Gen. Sts. c. 43, § 12, or Pub. Sts. c. 49, § 13, the word may not in every instance be used as the exact equivalent of the words "locate anew" of those sections. Upon the whole we are inclined to consider the proceedings as having been under the

Digitized by Google

more general authority conferred by Pub. Sts. c. 49, § 1. So construed but one error appears, namely, that the land damages are ordered to be paid by the two towns, rather than by the county. We do not think that under the circumstances that error requires us to quash the proceedings. The original petition was filed in March, 1898, and the adjudication that common convenience and necessity required the relocation was on April 12, 1898. At the meeting on May 16 to relocate, the whole objection of the selectmen of Watertown was to any action that would subject Watertown to expense. At that meeting a plan was exhibited by the commissioners, in accordance with which the subsequent alterations appear to have been made. No one objected that the commissioners had not authority to make such alterations under the petition, or contended that the proceedings were under Pub. Sts. c. 49, § 13. The final order was made on June 14, 1898. At no time until the commencement of the present proceedings on October 19, 1898, did the authorities of Watertown notify the county commissioners or the town of Belmont that the inhabitants of Watertown objected to the validity of what the commissioners had done. On June 30, 1898, Belmont appropriated the sum of $25,000 to do what the order of the commissioners required of that town, and proceeded with the work of complying with the order. Before the petition for certiorari was filed some of the work had been completed, other parts were in process of construction, and Belmont had expended and become liable for about $10,000 on account of the work. Whether Belmont has paid any of the land damages does not appear. Besides this the selectmen of Belmont have granted a location for a double track to the West End Street Railway Company, in the highway as laid out by the commissioners, and that location was accepted by the company in July, 1898, and except for a short distance, where only one track was built, double tracks have been put in by the company, in conformity to the highway as the commissioners ordered it to be built. It is true that the chairman of the selectmen of Watertown told the president of the railway company on July 15, 1898, that the selectmen of Watertown believed that the action of the commissioners was illegal, and that a town meeting would be called as soon as practicable to act upon the matter of setting it



Digitized by Google

aside; but no town meeting was held until September 27, 1898, and the petition for certiorari was not filed until October 19, 1898. Assuming that the president of the railway company told the selectmen of Belmont what he had been told by the chairman of the selectmen of Watertown, there was nothing in that which required the authorities of Belmont to refrain from doing what they had been ordered to do by the commissioners, or which required the railway company to wait indefinitely to see what the town of Watertown would do. So far as appears, the town of Belmont has acted in good faith. It would be difficult to say that the authorities of Watertown have acted with that promptness which they should have displayed in a matter of this kind. See *Noyes* v. *Springfield*, 116 Mass. 87. They have suffered the town of Belmont to go on and incur large liabilities and expend large sums, besides taking other action upon the assumption that the action of the county commissioners was valid.

It seems to us upon the whole that justice does not require us to grant the writ of certiorari, but rather the contrary. Although the error in regard to land damages would have led to a judgment correcting that part of the commissioners' action at least, if the objection had been seasonably taken and the petition for certiorari promptly brought, (see *Westport* v. *County Commissioners*, 9 Allen, 203,) the delay, and its consequences to others than the petitioner, have been such that the petition should be denied. *So ordered.*

---

## JAMES W. DUDLEY *vs.* JULIA DUDLEY.

Suffolk. December 11, 1899. — April 17, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Resulting Trust — Finding by Justice after Verdict on Issues of Fact submitted to Jury.*

A resulting trust will not be declared in favor of a person who causes land to be conveyed to a woman, not his wife or related to him, in consideration of a cash payment by him of a part of the purchase price and of a note and mortgage given by her to the grantor to secure the balance, although he intends, and she

Digitized by Google

agrees, but not in writing, that the title taken by her in her own name shall be held by her for his benefit.

Although a verdict rendered upon issues of fact submitted to a jury in a suit in equity, if not set aside, is regarded as settling the facts so put in issue and is conclusive upon those issues, yet a justice who afterwards hears the case may, upon the evidence before him, find other material facts not inconsistent with the findings of the jury.

BILL IN EQUITY, filed December 17, 1897, seeking to compel the defendant to convey to the plaintiff certain land held by her upon an alleged trust for him.

The bill alleged that the defendant, whose real name was Julia Sylvester, had lived with the plaintiff a great many years as his housekeeper, and had been paid by him for her services as such; that during that time, although no marriage had been solemnized between them, she had become known as Julia Dudley and as the wife of the plaintiff; that on December 10, 1884, the plaintiff caused certain land situated in Winchester to be conveyed by one Smith to the defendant by a deed in which she was described as his wife; that she had thereafter refused to comply with the request of the plaintiff to convey the land to him, and claimed it as her own property. The prayer of the bill was that the defendant might be ordered, as a trustee, to convey the land to the plaintiff.

By the deed referred to in the bill, the land in question was conveyed by one Caroline M. Smith in fee simple to "Julia Dudley, wife of James W. Dudley of said Boston, in her own right." The answer of the defendant denied that she had lived with the plaintiff as his housekeeper, or had been paid anything by him for her services as such, or that she had consented to become or act as a trustee for him, and alleged that she had lived with him as, and in the full belief that she was, his wife, and that she had never signed any instrument in writing creating or declaring a trust as required by statute.

Hearing in the Superior Court, at which, upon the motion of the defendant, issues of fact were framed and submitted to the jury as follows:

1. Did Julia Dudley live with James W. Dudley as his housekeeper? 2. Did James W. Dudley pay Julia Dudley for services rendered as housekeeper? 3. Did Julia Dudley believe that she was the wife of James W. Dudley? 4. Did Julia Dudley

Digitized by Google

live with James W. Dudley as his wife? 5. Did Julia Dudley ever agree or consent to hold the land described in the petitioner's bill for the benefit of James W. Dudley? 6. Did Julia Dudley receive by said conveyance the sole interest in the land? 7. Did she receive it for the benefit of James W. Dudley? 8. Was any instrument in writing signed by the defendant or by her attorney creating or declaring this trust?

The jury to whom the issues were submitted were instructed by *Hardy*, J., in substance, that they were to consider the transaction as it occurred on December 10, 1884, and if they were satisfied that the plaintiff advanced the entire consideration for the land and paid for it with his own money, and the defendant paid none of her own money therefor, they should find that there was an implied agreement created by law that she held the land in trust for the plaintiff; but if, it being shown that she gave her own note and mortgage in part payment for the conveyance, they found that prior to December 10, 1884, the plaintiff gave or loaned her the money, or that she advanced her own money, for the purchase of, and payment for, the whole or a part of the land, they should find that there was no implied agreement created by law that the land was held in trust for the plaintiff.

The jury answered the first, second, third, sixth, and eighth issues in the negative, and the fourth, fifth, and seventh in the affirmative.

After the verdict on the issues of fact the case was further heard in the Superior Court, before *Fessenden*, J., who allowed a bill of exceptions in substance as follows.

The plaintiff offered in evidence a copy of the charge of the judge presiding at the trial of the issues of fact, and the defendant, subject to the exception of the plaintiff, offered evidence tending to show that, at the time of the conveyance and the cash payment of $1,000, the defendant gave her note and mortgage to the grantor for $2,800 as part of the consideration for the conveyance to her.

The judge found upon this evidence that the defendant by giving her note and mortgage paid a part of the consideration for the conveyance, and entered a decree dismissing the bill. The plaintiff alleged exceptions.

Digitized by Google

*H. P. Harriman & H. E. Perkins*, for the plaintiff.

*M. Storey*, for the defendant.

BARKER, J. The whole record before us shows that the plaintiff's contention to have a resulting trust declared in his favor rests upon the fact that in the year 1884 he caused the land to be conveyed to the defendant in consideration of a sum of $1,000 furnished by the plaintiff, and of a note and mortgage made by the defendant for the balance of the purchase money, amounting to $2,800, the plaintiff intending, and the defendant agreeing, but not in writing, that the title taken by the defendant in her own name should be held by her for the benefit of the plaintiff.

Upon this state of facts he has no right to have a trust declared in his favor, for the reason that a part of the consideration only was furnished by himself, and the rest of the consideration was furnished by the defendant. The case stated is governed by the decision of *McGowan* v. *McGowan*, 14 Gray, 119; *Bourke* v. *Callanan*, 160 Mass. 195. It is to be distinguished from *McDonough* v. *O'Niel*, 113 Mass. 92, by the circumstances that in the present case, when the purchase was made from the defendant's grantor the land was unencumbered, and the note and mortgage made by the defendant were given as payment in part of the purchase price of unencumbered land, while in *McDonough* v. *O'Niel* the purchase was of an equity of redemption, and the note and mortgage given by the grantee were not given to his grantor, and were no part of the price paid for the conveyance, but were given to the former mortgagee in substitution for his former mortgage. See *Bourke* v. *Callanan*, 160 Mass. 195, 196.

Therefore the bill was rightly dismissed if the fact that part of the consideration of the conveyance to the defendant was her note and mortgage given to her grantor in part payment of the price of the land, was not inconsistent with the findings of the jury upon the issues theretofore submitted to them. When issues of fact are submitted to a jury in an equity suit, and a verdict is rendered upon the issues and is not set aside, the verdict is regarded as settling the facts so put in issue. The verdict is conclusive upon those issues. But the justice who hears the cause may, however, find upon the evidence before him any other material facts not inconsistent with the findings of the jury.

Digitized by Google

*Franklin* v. *Greene*, 2 Allen, 519. *Ross* v. *New England Ins. Co.* 120 Mass. 113. *Langmaid* v. *Reed*, 159 Mass. 409.

Assuming that the charge given to the jury at the trial of the issues is competent to show what facts they determined in finding as they did, it is plain, from an examination of the copy of the charge put in evidence by the plaintiff, that there was no dispute at that trial, that the defendant did in fact give her own note and mortgage in part payment for the conveyance; and that the findings that she did not receive the sole interest, and took the title for the plaintiff, as the case was submitted to the jury, amounted merely to this, that there was a resulting trust, implied by law and to which the defendant had impliedly assented, because the plaintiff had himself furnished all the cash part of the consideration given for the conveyance.

This being so, we think the justice who heard the case after the findings had been made could receive the evidence which he admitted, and upon it could dismiss the bill.

*Exceptions overruled.*

---

SILVANUS SMITH & another *vs.* BENJAMIN F. BUTLER & others.

Suffolk. December 15, 1899. — May 15, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Amending Actions at Law into Bill in Equity — Statute of Limitations — Custom — Advances — Interest — Statute — Exception.*

The Superior Court may allow an action at law to be amended into a bill in equity, and it has power, when, through a misapprehension, a plaintiff has brought separate actions at law to enforce a cause of action which can only be enforced by one bill in equity, to consolidate the actions and amend the consolidated action into a bill in equity.

If the cause of action sued on was not barred by the statute of limitations when actions at law were originally brought, but it was barred when the motion to consolidate the actions and to convert them into a bill in equity was made, the plaintiff's claim against the defendants in the original actions at law is not barred, but his claim against those defendants, who were first made parties to the litigation by the filing of the bill in equity, is barred.

It is competent for parties to agree to pay interest on items in a running account,

Digitized by Google

and such an agreement may be proved by evidence that there was a custom to that effect and that that custom was known to the parties.

If the interest charge, being the balance of interest charged on the items on each side of an account for the time in question, was in fact paid, and interest was in fact charged each year on a new principal which was not made up in any part of interest, it being a principal ascertained by deducting from the old principal the balance of the credits for that year left after deducting from them the interest balance charged, the contention that interest has been charged on interest, and more than six per cent interest has been charged in contravention of Pub. Sts. c. 77, § 3, there being no agreement in writing, is unsound and cannot avail.

If there is nothing on the record which warrants the suggestion contained in an exception, the exception is not before the court.

BILL IN EQUITY, praying for an account. Trial in the Superior Court, before *Sheldon*, J., who reported the case for the determination of this court, in substance as follows.

Between the years 1882 and 1888 the firm of Smith and Townsend, composed of Silvanus Smith and James L. Townsend, were ship's husbands and agents of the barque Nehemiah Gibson. Silvanus Smith was also one of the co-owners of the barque. The owners of the barque during that period were twenty-three in number, among them being Benjamin F. Butler, Joseph L. and R. H. McLauthlin, copartners under the firm name of J. L. and R. H. McLauthlin, and one Morton Bradford.

In the year 1888 Smith and Townsend ceased to become the ship's husbands, and on January 1, 1888, there was, according to their account, due to them from the owners the sum of $8,729.18. The account not being settled on April 6, 1888, they began three separate actions at law, the first against Benjamin F. Butler, the second against Joseph L. and R. H. McLauthlin, copartners, and the third against Morton Bradford, in each action setting up their entire account against the owners, and seeking to recover from each of the parties a judgment for the full amount of the sum, or such part thereof as the defendant in the cause should be found to be indebted to them. An agreement was entered into in the cases against the McLauthlins and Bradford that these cases should abide the result of the judgment in the case of *Smith* v. *Butler*. That case was tried in the Superior Court, and judgment entered against the defendant Butler for his part of the indebtedness in the proportion of his ownership in the barque. The case was taken to the full court, and in

Digitized by Google

*Smith* v. *Butler*, 164 Mass. 37, it was held that the plaintiffs' remedy was not by action at law against each of the joint owners separately, but by bill in equity joining all of the owners. Thereupon the plaintiffs filed a motion in each of the three actions in the Superior Court to amend by changing the action into a bill in equity, in which all of the co-owners were named as parties defendant, and stating in the motion that a new action "might be barred by the statute of limitations." The motion was allowed in each action, and one bill in equity was filed in amendment of the three actions. Subpœnas were issued summoning in the additional parties defendant; service was duly made on all of the parties defendant, except such as were out of the State and except one owner, Edward Powers, who had deceased, and of whose estate there was no administrator. The additional parties defendant summoned in were William Waters, Jr., Alfred Cox, executor of the estate of Mark Googins, Susan Wadsworth, administratrix of the estate of Peleg Wadsworth, and Josephus Dawes. The motion in each action was allowed, and the case was referred to a master, to whose findings certain exceptions were taken. "I find that the ship's husbands provided from time to time, under an agreement with the owners, funds for fitting out and disbursing said vessel; that they insured freights to cover all sums thus advanced by them. . . . I find that it was the custom of ship's husbands in the port of Boston to insure freights to cover advances made by them, and to charge to the owners the premiums of such insurance, and that as ship's husbands they had a right in accordance with said custom to charge to the defendants the premiums for such insurance paid by them." The exceptions to the master's report stated, "it not appearing that plaintiffs were charging insurance in said manner."

"There was no evidence that the defendant McLauthlin knew that the plaintiffs were charging insurance, and charging and crediting interest as alleged. The defendant McLauthlin testified not only that he did not know such custom, but that there was no such custom; but I find that such was the custom, and that the defendant McLauthlin had owned in a large number of vessels sailing from the port of Boston. I find that it was the custom of the port of Boston for ship's husbands to make advances

Digitized by Google

for disbursing vessels managed by them and credit interest on all sums received by them from the date of the receipt, and debit interest on all sums paid out by them from date of payment. I find that the charges of interest made by the plaintiff were in accordance with this custom, and that there was an implied agreement between the plaintiffs and the defendants that the plaintiffs should so charge and allow interest. I find that annual rests were taken in the plaintiffs' accounts on the thirty-first day of December of each year, and the balance carried forward as an item of next year's account, but that in each year the amount received by the plaintiffs and credited and duly applied in their account with the owners of said vessel exceeded the amount of interest charges for that year. . . . I find as a matter of law that the cause of action set forth in the plaintiffs' bill of complaint is not barred by the statute of limitations."

One of the exceptions to the master's report was that the claim was barred by the statute of limitations.

The master found for the plaintiffs against each of the defendants, except one Weston, for his proportional part of the indebtedness of the barque. The defendants' exceptions to the master's report were overruled; the report was confirmed by the Superior Court and a decree entered in accordance with the report. The defendants Butler, the McLauthlins, Bradford, Waters, Jr., Dawes, Wadsworth, and Cox appealed from the decree; and the case was by the agreement of the parties reported for the determination of this court by *Sheldon*, J. If the decree was correct it was to be affirmed; otherwise such order was to be made as justice and equity might require.

*E. Lowe & W. H. Baker*, for the defendants.

*A. C. Burnham*, for the plaintiffs.

LORING, J. 1. The first question presented in this case is that raised by the appeal of the defendants Butler, R. H. and J. L. McLauthlin, and Bradford, who were the defendants in the three actions at law, from the order of the Superior Court allowing the three actions at law to be consolidated and amended into one bill in equity, in which all the part owners of the barque (twenty-three in addition to themselves, making twenty-six in all) were joined as parties defendant. A motion was made by the plaintiff in each of the three actions at law, stating

Digitized by Google

that the action in which the motion was filed and the other actions at law had been begun under a misapprehension, and that, in consequence of the lapse of time, a new proceeding might be barred by the statute of limitations, and praying that the action at law in question might be amended by changing it into a suit in equity in which all of said co-owners should be joined, and annexing thereto the bill in equity to be filed if the motion was allowed. The Superior Court made an entry in each action at law, allowing the "motion to amend by changing into suit in equity and consolidation with" the other two actions at law. There is no question of the power of the Superior Court to allow an action at law to be amended into a bill in equity, and we have no more doubt of its power, when, through a misapprehension, the plaintiffs have brought three separate actions at law to enforce a cause of action which can only be enforced by one bill in equity, to consolidate the actions and amend the consolidated action into a bill in equity.

2. The second question is the question whether the plaintiffs' claim is barred by the statute of limitations. The cause of action sued on was not barred when the three actions at law were originally brought, but it was barred when the motion to consolidate those actions and to convert them into a bill in equity was made. We are of opinion that the plaintiffs' claim against the defendants in the three original actions at law is not barred, but that his claim against those defendants, who were first made parties to the litigation by the filing of the bill in equity, is barred.

So far as the defendants in the three original actions are concerned, the cause of action enforced by the decree entered in the bill in equity is the cause of action sued on in the separate actions at law. In each action at law, the plaintiffs sought a judgment against the defendant in that action for his share of the deficit resulting from the voyages of the barque in question. In the bill in equity, a decree has been entered against each defendant separately, directing him to pay to the plaintiff a specified sum which the court found to be that defendant's share of the deficit in question. The only purpose of the amendment was to cure a mistake made by the plaintiffs' counsel as to the proper remedy for enforcing the causes of action which were the

Digitized by Google

subject of the three actions at law; and the reason given by the plaintiff for his motion to be allowed to amend in place of beginning a new action was that a new action "might be barred by the statute of limitations." It has been the settled practice in this Commonwealth for a period of over fifty years to allow amendments under such circumstances, in place of putting a plaintiff to a new suit, and to allow those amendments on the ground that if a new suit were brought, it would be barred by the statute. We cannot doubt that this was effectual and that the defendant could not plead the statute to the action so amended. *Davenport* v. *Holland*, 2 Cush. 1, 15. *Loring* v. *Salisbury Mills*, 125 Mass. 138, 142. *Sanger* v. *Newton*, 134 Mass. 308, 309, 310.

But the suit in equity, as against the defendants, who were brought in by amendment, was begun for the first time when the amendment was made and they were for the first time made parties defendant; the statute of limitations is a bar to the claim against them. *Miller* v. *M'Intyre*, 6 Pet. 61. *Woodward* v. *Ware*, 37 Maine, 563. *Brown* v. *Goolsby*, 34 Miss. 437.

The case does not come within the principle of *Burgie* v. *Parks*, 11 Lea, 84, in which it was held that, in a suit to enforce a claim against the estate of a testator of whose will there were two executors, one of whom only was sued, the statute of limitations could not be set up by the other executor when he was joined as a party defendant by an amendment after the statutory time had run. In that case, the amendment cured a description of the person who represented the estate, which was liable for the cause of action originally sued on. Here, no claim was made against the new defendants in the three actions originally brought at law, and the amendment introduced a new cause of action against a new defendant. Nor does this case come within *Woodward* v. *Ware*, 37 Maine, 563, 564, cited by the plaintiff. In that case, it was intimated that if a surety is sued before the statute has run, and the principal is made a party defendant by amendment after the expiration of the statutory time, it may be that he could not plead the statute of limitations. The principle on which the intimation rests is that the surety, if the surety is forced to pay under those circumstances, would have a remedy over against the principal, though the remedy of the creditor

Digitized by Google

against the principal was barred. But here the plaintiff seeks to charge each defendant with his separate share of the loss resulting from the foreign voyages of the barque in question, and the payment by the defendants in the three original actions at law of their shares of this loss gives them no remedy over against the defendants who have been subsequently brought in by the amendment or against anybody else.

3. The third question is that raised by the exception to the admission by the master, of evidence of a "custom of the port of Boston for ship's husbands to make advances for disbursing vessels managed by them, and credit interest on all sums received by them from the date of the receipt, and debit interest on all sums paid out by them from date of payment," and to the interest being computed in that way in this case.

But the master found "that there was an implied agreement between the plaintiffs and the defendants, that the plaintiffs should so charge and allow interest." It is competent for parties to agree to pay interest on items in a running account, and such an agreement may be proved by evidence that there was a custom to that effect, and that that custom was known to the parties. *Fisher* v. *Sargent*, 10 Cush. 250, 251. In this case there was evidence that there was such a custom, and that that custom was known to the parties. The defendants, R. H. and J. L. McLauthlin, claimed that the right to charge them with interest stands differently from the right to charge interest against the other defendants, because one of them testified "that he did not know such custom"; but the master may have disbelieved this testimony. The master found on competent evidence that there was such a custom, and that "McLauthlin had owned in a large number of vessels sailing from the port of Boston." This, coupled with the further testimony of McLauthlin, "that there was no such custom," was sufficient to warrant the master in disbelieving the testimony in question. The defendants make the further objection that a new principal was carried forward each year to the debit side of the account, and that interest was charged on such principal at the rate of six per cent per annum, and thereby interest has been charged on interest, and more than six per cent interest has been charged, in contravention of Pub. Sts. c. 77, § 8, there being in this case

Digitized by Google

no agreement in writing. But it is found by the master "that in each year the amount received by the plaintiffs and credited and duly applied in their account with the owners of said vessel exceeded the amount of interest charges for that year." If that is the case, the interest charge, being the balance of interest charged on the items on each side of the account for the year in question, was in fact paid, and interest was in fact charged each year on a new principal which was less than the original principal and which was not made up in any part of interest; for it was a principal ascertained by deducting from the old principal the balance of the credits for that year left after deducting from them the interest balance charged by the ship's husband.

4. The next question is the exception to the ruling of the master admitting evidence of a custom of ship's husbands in the port of Boston to insure freights to cover advances made by them, and to charge to the owners the premiums of such insurance, "it not appearing that plaintiffs were charging insurance in said manner."

Inasmuch as there is nothing on the record which warrants the suggestion contained in this exception that it did not appear that the plaintiffs were charging insurance in said manner, this exception is not before the court. *O'Brien* v. *Keefe*, 175 Mass. 274. Further, it does appear that that suggestion is not correct; the master found that the plaintiffs "insured freights to cover all sums thus advanced by them," and again, "that as ship's husbands they had a right, in accordance with said custom, to charge the defendants the premiums for such insurance paid by them."

5. The other questions raised by the appeals and exceptions were waived at the argument.

The decrees against the defendants, William Waters, Jr., Alfred Cox, executor of the estate of Mark Googins, Susan Wadsworth, administratrix of the estate of Peleg Wadsworth, and Josephus Dawes, were erroneous, and the bill as against those defendants should be dismissed. The decrees against Horace B. Butler, administrator of the estate of Benjamin F. Butler, Rufus H. and Joseph L. McLauthlin, and Morton Bradford were correct and should be affirmed.

*So ordered.*

Digitized by Google

## JOSEPH McLAUTHLIN & another *vs.* SILVANUS SMITH & another.

Suffolk. December 15, 1899. — May 15, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Set-off — Contribution — Equity — Practice — Judgment — Decree.*

Part owners of a vessel brought an action at law against a ship's husband to recover their share of a dividend. The defendant was the survivor of two partners who had acted as ship's husbands of a barque, which had been on voyages resulting in a loss, six sixty-fourths of which was due from the plaintiffs as owners of that undivided share in the vessel. *Held*, that the defendant's claim against the plaintiffs could not be availed of in set-off.

If, when an action is brought to collect a debt due from the defendant, there is pending in the same court a bill in equity brought by the defendant against the plaintiff to enforce contribution, the defendant should move to have the action at law continued until the bill in equity reaches a decree, and then move to have the judgment and decree set off one against the other and execution issued or a final decree entered for the balance due him or his adversary, as the case may be.

CONTRACT, upon an account annexed. Trial in the Superior Court, before *Sheldon*, J., who ruled that the matter offered by the defendant Smith could not be availed of in set-off, and directed the jury to return a verdict for the plaintiffs. The defendant alleged exceptions, which appear in the opinion.

*A. C. Burnham*, for the defendant.

*E. Lowe*, (*W. H. Baker* with him,) for the plaintiffs.

LORING, J. The only question presented in this case is the right of the defendant Smith, in an action to recover from him a liquidated sum, to set off the following claim which he has against the plaintiffs.

The defendant was the survivor of two partners, who had acted as ship's husband of a barque. The barque had been on several foreign voyages, resulting in a loss of $8,707.41, six sixty-fourths of which was due from the plaintiffs as owners of that undivided share in the vessel. When the declaration in set-off was filed, the bill in the case of *Smith* v. *Butler*, *ante*, 88, was pending, and the plaintiffs in this action were defendants in that suit.

Digitized by Google

The Superior Court ruled that the defendant's claim against the plaintiffs was not a matter which could be availed of in set-off. That ruling was right.

The claim which it is sought to set off is a claim for contribution, which can only be enforced in a bill in equity brought by the ship's husband, in which those liable to contribute are made parties defendant, (*Smith* v. *Butler*, 164 Mass. 37,) and therefore cannot be made the subject of a declaration in set-off in an action at law brought by one part owner to collect an outside debt due from the ship's husband. Since there was a bill to enforce contribution pending in the same court when the plaintiffs brought their action to collect the debt due from the defendant, the defendant's remedy was plain: he should have moved to have the action at law to recover the outside debt continued until the bill in equity reached a decree, and then have made a motion to have the judgment and decree set off one against the other and execution issued, or a final decree entered for the balance due him or his adversary, as the case might be. The power of the court to order a continuance in case of two actions at law, and to direct execution to issue for the balance between the two judgments, has been practised upon for many years; *Rider* v. *Ocean Ins. Co.* 20 Pick. 259; *Ames* v. *Bates*, 119 Mass. 397, 398, 399; see also Pub. Sts. c. 171, §§ 25, 26, 27; and on the same principle the Superior Court could have set off the judgment and decree one against the other, and issued execution or entered a decree for the balance.

*Exceptions overruled.*

Digitized by Google

## SIMON ROTHSCHILD & another *vs.* ROBERT A. KNIGHT, assignee.

Hampden. March 12, 1900. — May 15, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Writ of Error — Joinder of Issues of Law and Fact — Hearing by Single Justice on Issues of Fact — Report — Jurisdiction acquired over Non-resident by Attachment of Debt due him from Resident Debtor — Submission to Jurisdiction by Voluntary Appearance — Amendments — Consent of Attorney not of Record — Action for Forfeiture — Certificate of Witness — Entry of Judgment.*

Issues of law and issues of fact may be joined in the pleadings upon a writ of error.

A single justice of this court may hear the evidence relative to issues of fact upon a writ of error, and, if he chooses, may report the case to the full court.

An attachment by the trustee process of a debt due to a non-resident defendant from a resident debtor gives jurisdiction to render a judgment which will be valid everywhere as against the property attached, although the defendant has not been served with process.

The voluntary general appearance in a personal action of a non-resident defendant who has not been served with process gives jurisdiction to render a personal judgment against him.

There is no necessary inconsistency between different counts of a declaration in an action by the assignee of an insolvent debtor, the first of which is upon an account annexed for "goods delivered" to the defendant by the insolvent debtor, the second of which alleges that the goods were conveyed to the defendant by the insolvent debtor to prevent them from coming to his assignee in insolvency, and the third of which alleges that the goods were so conveyed with a view to give the defendant a preference, and there is no such irregularity or imperfection as to affect the validity of a judgment for the plaintiff.

If amendments to pleadings have been regularly allowed by the court with the consent of the duly authorized attorneys of the adverse parties, the fact that an attorney who consented to one of the amendments, although regularly employed, did not enter his appearance of record until later is immaterial.

An action by the assignee of an insolvent debtor to recover the value of goods alleged to have been conveyed by the debtor to the defendant for the purpose of giving him a preference and of preventing them from coming to the assignee is not an action for the recovery of a penalty, but for the recovery of the value of the goods conveyed in fraud of the laws relative to insolvency, and may be commenced by the trustee process.

The allowance of fees to a witness in the taxation of costs upon a certificate signed in his name by his duly authorized agent and not by his own hand, is not erroneous, and, if it were, it is at least doubtful whether the mistake could be taken advantage of by a writ of error.

The entry of judgment charging trustees in the Superior Court, made by the clerk on the first Monday of the month without a special order of the court, is in accordance with the statutes and the 27th rule of the court.

Digitized by Google

WRIT OF ERROR, to reverse a judgment of the Superior Court rendered in an action of tort brought by the defendant in error, as assignee in insolvency of one McKeon, against the plaintiffs in error, to recover the value of goods alleged to have been conveyed to them by the insolvent debtor in fraud of the laws relating to insolvency. The errors assigned were (1) that there was no valid and effectual attachment of the goods, estate, or effects of the plaintiffs in error; (2) that the action was an attempt to acquire jurisdiction of the plaintiffs in error, who are non-residents, by attaching a debt due to them in violation of their rights under the Constitution of the United States; (3) that the plaintiffs in error were not voluntarily before the Superior Court, and no service upon them personally or by publication, as ordered by the court, was shown; (4) that the judgment deprived the plaintiffs in error of their property in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; (5) that there was a joinder of separate, inconsistent causes of action in contract and tort without an averment that they were for one and the same cause of action; (6) that the verdict was ambiguous when read in connection with the declaration of the defendant in error, and did not support any count therein; (7) that there was no joinder of issue on the third count, and that it would not support a verdict; (8) that there was no authority for the filing, on June 21, 1897, of the amendment to the declaration of the defendant in error; (9) that the second count of the declaration of the defendant in error would not support the verdict; (10) that the amendments to the declaration of the defendant in error converted the action into an action for the recovery of a penalty in violation of the rights of the plaintiffs in error under the provisions of the Fourteenth Amendment to the Constitution of the United States; (11) that the declaration of the defendant in error contained counts for a penalty, and that a judgment thereon would be conclusive on the plaintiffs in error as to their liability therefor, and would, without further trial, subject their rights to such penalty, and that such attempt to acquire jurisdiction over their persons and property by the attachment by the trustee process of debts due to them by debtors in this Commonwealth was in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States;



Digitized by Google

(12) that the defendant in error signed the certificate of attendance and travel of two witnesses, which is required by law to be signed by the witnesses themselves, and that the judgment for costs was erroneously made up from such informal certificate; (13) that the entry on the docket charging the trustees was made without the authority or order of the Superior Court; (14) that the writ was entered late without the consent of the plaintiffs in error or the order of the Superior Court; (15) that the defendant in error had affirmed the sale to the plaintiffs in error, and had waived all right, if any existed, to an action of tort; (16) that the judgment would impair the obligation of contracts in violation of the provisions of the Constitution of the United States; (17) that the Superior Court did not give full faith and credit to the judicial proceedings of courts of New York as required by the Constitution of the United States.

Pleas: (1) *In nullo est erratum* as to errors of law assigned; (2) a traverse of errors of fact assigned; (3) as to the third assignment of error, that, on July 8, 1896, it appearing that the plaintiffs in error were not inhabitants of this Commonwealth at the time of the service of the writ in the original action, and that they had no last and usual place of abode, nor any tenant, agent, or attorney known to the defendant in error, and that no personal service of the writ had been made upon them, the Superior Court issued an order of notice that the defendant in error give notice to the plaintiffs in error of the pendency of that action by publication or by personal service of the order returnable on the first Monday of September, 1896; that the defendant gave notice as ordered by the Superior Court, but by accident and mistake the affidavit of publication and service of the order of notice was not filed in the Superior Court until July 6, 1899; that the plaintiffs in error voluntarily appeared in the original action on September 16, 1896, and pleaded by their counsel, C. C. Spellman, Esquire, and later by additional counsel, and thereafter personally appeared and contested that action in the Superior Court, and, on exceptions, to this court, thereby submitting themselves to the jurisdiction of the Superior Court and of this court; (4) as to the eighth assignment of error, that the amendment to the declaration was indorsed as follows: "This may be filed and allowed, E. N. Hill, Defendants' Attorney"; that Hill orally appeared

Digitized by Google

for the plaintiffs in error, in the original action in the Superior Court, on June 21, 1897, and then requested the clerk to enter his appearance for them, and, as their attorney, tried the case for them; and that when he consented to the amendment and when it was filed he had full authority to consent thereto; (5) as to the twelfth assignment of error, that the certificate of the two witnesses was signed in their names by Robert A. Knight, their duly authorized agent therefor; (6) that no other errors have been assigned, except such as are matters of form, which might by law have been amended; that no errors in law have been assigned which occurred after verdict; that the judgment was in conformity with the verdict, even although not in conformity with the pleadings; that the constitutional rights of the plaintiffs in error have not been violated; and that the record does not disclose a want of jurisdiction of the court.

Hearing in this court, before *Morton*, J., who reported the case for the determination of the full court, in substance as follows.

The fourteenth assignment of error was abandoned at the hearing. The plaintiffs in error moved that the defendant in error be required to elect between so much of his plea as alleged *in nullo est erratum* and so much as traversed the issues of fact. The judge denied the motion. If as matter of law the motion should have been granted, but, in any aspect of the case, the denial thereof was not prejudicial to the plaintiffs in error, they are to take nothing by their motion; otherwise the report is to be discharged and the case to stand for hearing anew. The plaintiffs in error are residents of the city and State of New York. The defendant in error is the assignee in insolvency of one McKeon, and the judgment which it is sought by this writ of error to reverse was obtained by him in an action of contract or tort against the plaintiffs in error to recover the value of goods conveyed to them by the insolvent debtor in fraud of the insolvent laws. The action, which was for the value of certain "goods delivered" according to an account annexed, was commenced by the trustee process in the Superior Court for Hampden County, in which the defendant in error and several of the alleged trustees lived. The defendants in that action, who are the present plaintiffs in error, being non-residents, notice of the action was

Digitized by Google

ordered to be given to them by publication, and the action was continued until such notice should be given. The notice, which was returnable on the first Monday of September, 1896, was given as ordered, but a return that it had been given was not made until July 6, 1899. On September 16, 1896, the defendants in that action appeared generally by their attorney, Charles C. Spellman, Esquire. On October 12, 1896, with the consent of the attorney for the defendants, an amendment to the declaration adding a second count was allowed, and on June 21, 1897, a second amendment adding a third count, with the consent of E. N. Hill, Esquire, as attorney for the defendants, was allowed. The judge found that Mr. Hill had been retained generally by the defendants, the present plaintiffs in error, and that by virtue of his general authority he could consent to the allowance of the amendment, although his written appearance was not entered until June 26, 1897.

The second count of the declaration alleged that McKeon, being insolvent, and in contemplation of insolvency and within six months before the filing of his petition in insolvency, conveyed the property described in the account annexed to the first count to the plaintiffs in error, they having reasonable cause to believe him to be insolvent and in contemplation of insolvency, with intent to prevent the property from coming to his assignee in insolvency or from being distributed under the laws relating to insolvency and to evade the provisions of such laws. The third count alleged that McKeon, being insolvent, and within six months before the filing of his petition in insolvency, with intent to give a preference to the plaintiffs in error, paid, pledged, assigned, transferred, and conveyed the property described in the account annexed to them, they having reasonable cause to believe him insolvent or in contemplation of insolvency, in fraud of the laws relating to insolvency.

Certain trustees answered, disclosing goods, effects, and credits in their hands, and were charged by an order entered by the clerk under a general order, and pursuant to the established practice.

The jury returned a verdict for the defendant in error, and judgment was entered for him, and execution issued thereon. Witness fees were included in the costs, and the certificate of

Digitized by Google

two witnesses was signed for them by the defendant in error, who, the judge found, was asked by each of such witnesses to sign for him, and did so, adding "by R. A. K." It did not appear that the plaintiffs in error had notice of the taxation of costs; and they did not object to the taxation prior to the issue of the execution, nor did they appeal from the taxation.

The judge was of opinion that the judgment should be affirmed, but the counsel for the plaintiffs in error suggesting a doubt as to his authority to dispose of the case in view of the peculiar nature of the proceedings, the judge reported the case for the consideration of the full court.

A transcript of the record of the case, in which it was sought to have the judgment reversed, was annexed to the judge's report; and the bill of exceptions therein contained made reference to certain judicial proceedings in the State of New York between the present plaintiffs in error and James McKeon, but it does not appear from the record that they were put in evidence at the trial of the present case.

*H. J. Jaquith*, for the plaintiffs in error.

*C. M. Rice*, (*R. A. Knight* with him,) for the defendant in error.

KNOWLTON, J. The proceedings at the hearing were correct. Under our present practice issues of law and issues of fact may be joined in the pleadings upon a writ of error. *Eliot* v. *McCormick*, 141 Mass. 194. A single justice may properly hear all the evidence on the issues of fact, and, if he chooses, report the case to the full court.

The questions principally discussed at the argument have been fully considered in recent cases of high authority, and decided adversely to the plaintiffs in error. There was an attachment in due form by trustee process of debts due the original defendants from debtors residing in this Commonwealth. Pub. Sts. c. 164, § 1; c. 183, § 1. Such an attachment gives jurisdiction to render a judgment which will be valid everywhere as against the property attached. *Ocean Ins. Co.* v. *Portsmouth Marine Railway*, 3 Met. 420. *Folger* v. *Columbian Ins. Co.* 99 Mass. 267. *Eliot* v. *McCormick*, 144 Mass. 10. *Cooper* v. *Reynolds*, 10 Wall. 308. *Pennoyer* v. *Neff*, 95 U. S. 714. *Freeman* v. *Alderson*, 119 U. S. 185. *Chicago, Rock Island, & Pacific*

Digitized by Google

*Railway* v. *Sturm*, 174 U. S. 710. *King* v. *Cross*, 175 U. S. 396. *Cross* v. *Brown*, 19 R. I. 220.

The plaintiffs in error do not contend that the attachments would not be effectual to give jurisdiction against the property if real estate or specific goods were attached; but their principal contention is that a debt due from a trustee to a non-resident defendant cannot be effectually attached under the statute cited. This contention is answered as to the law of this Commonwealth by the first two cases cited in the last paragraph. The plaintiffs in error contend that the debts due them from debtors in Massachusetts were not property within this Commonwealth upon the attachment of which jurisdiction could be founded as against a non-resident on whom no service was made in this State, and they argue that the situs of the property was in the State of New York, where they resided. It is true that for most purposes the situs of credits follows the creditor, and that their situs for taxation, or for administration after the death of the creditor, is ordinarily in the place of his domicil; but so far as the question before us depends upon the situs of the debt, it must be held that the situs in reference to collection is in the place where proceedings may be had against the debtor. That which ought to be paid is presumably in the possession of the debtor, wherever he happens to be. The debt can be collected by law only in the place where jurisdiction of the debtor can be obtained. The creditor may go there to collect his debt. The situs of the debt, viewed as his property, follows him thither. The plaintiff in the trustee process represents the creditor's right. The question is, where the debt as property should be deemed to be situated in reference to process for collection. Practically it must be where the debtor is amenable to suit. This is the rule adopted by courts generally in the construction of statutes for the collection of debts by trustee process. Any other construction would leave these statutes ineffectual for the purposes for which they were enacted. In *Cross* v. *Brown*, *ubi supra*, the subject was considered at length with a citation of the authorities, and this conclusion was reached. In *Chicago, Rock Island, & Pacific Railway* v. *Sturm*, *ubi supra*, there was a discussion of the subject in reference to constitutional questions, with the same result, and in *King* v. *Cross*, *ubi supra*,

Digitized by Google

affirming the decision of the Supreme Court of Rhode Island in the same case under the name of *Cross* v. *Brown*, the doctrine was reaffirmed. These cases settle the validity of an attachment by trustee process as the foundation for a judgment against a debt due from the trustee to a non-resident who has not been served with process.

In the present case not only was there an attachment effectual to give jurisdiction to render the judgment against the defendant, but there was a voluntary general appearance by the original defendants which gave jurisdiction to render a personal judgment against them. They appeared by duly authorized attorneys in the usual way, and contested the case at all stages until judgment was rendered. That such an appearance gives jurisdiction without reference to service is familiar law. Pub. Sts. c. 167, § 82. *Loomis* v. *Wadhams*, 8 Gray, 557, 561. *Gilman* v. *Gilman*, 126 Mass. 26. *Wright* v. *Andrews*, 130 Mass. 149. *Eliot* v. *McCormick*, 144 Mass. 10. *Hazard* v. *Wason*, 152 Mass. 268. *Cooper* v. *Reynolds*, 10 Wall. 308, 317. *Pennoyer* v. *Neff*, 95 U. S. 714, 723, 731, 733.

Most of the other questions raised are sufficiently answered by the Pub. Sts. c. 187, § 3, which is as follows: "A judgment in a civil action shall not be arrested or reversed for a defect or imperfection in matter of form which might by law have been amended; nor by reason of a mistake respecting the venue of the action; nor because the judgment is not in conformity with the allegations of the parties, if it is in conformity with the verdict; nor shall any error in law in a civil action in which the defendant appeared and a verdict was rendered, except such as occurs after verdict, be assigned in a writ of error. But nothing herein contained shall prevent either party from assigning an error affecting the jurisdiction of the court."

Apart from this statute, the writ cannot be maintained. There is no necessary inconsistency between the counts of the declaration, and no such irregularity or imperfection as to affect the validity of the judgment. If the original defendants had raised objections by demurrer, it may be that an amendment would have been necessary, but it is plain that the judgment is well supported by the declaration. *Hillman* v. *Whitney*, 2 Allen, 268. The amendments to the declaration were regularly allowed

Digitized by Google

by the court with the consent of the duly authorized attorneys of the original defendants. The fact that the attorney who consented to the allowance of one of the amendments, although regularly employed, did not enter his appearance of record until later, is of no consequence.

The action is not for the recovery of a penalty, but to recover the value of goods conveyed in fraud of the laws relating to insolvency, and it properly might be commenced by trustee process. Pub. Sts. c. 157, §§ 96–98; c. 183, § 1.

The allowance of fees to two of the witnesses in the taxation of costs, upon a certificate signed in their name by their duly authorized agent, was not erroneous. The Pub. Sts. c. 199, § 14, is not to be construed so strictly as to require that the certificate shall be signed by the witness with his own hand. If the taxation were erroneous in this particular it is at least doubtful whether the mistake could be taken advantage of by a writ of error. See *Goodrich* v. *Willard*, 11 Gray, 380.

The entry of the judgment by the clerk without a special order of the court was in accordance with the statutes, and the rule of the court which requires the entry of judgments under the general order of the court at stated times in all cases which are ripe for judgment. Pub. Sts. c. 171, § 1. St. 1885, c. 384, § 12. Rule 27 of the Superior Court. It does not appear from the record that any judgment of a court in the State of New York was put in evidence at the trial, and the only judicial proceedings in that State referred to in the papers are suits to which the defendant in error was not a party.

*Judgment affirmed.*

Digitized by Google

ALBERT B. CHICK, executor, *vs.* CHARLES H. NUTE, assignee.

Suffolk. November 27, 1899. — May 16, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Unrecorded Chattel Mortgage — Delivery and Possession.*

An unrecorded mortgage of personal property, partly in possession and partly after acquired, not delivered to and retained by the mortgagee, is not valid against the assignee of the mortgagor under a voluntary assignment for the benefit of creditors. *Wilson* v. *Esten*, 14 R. I. 621, distinguished.

REPLEVIN of certain personal property, including fixtures. Trial in the Superior Court, before *Bishop*, J., who reported the case for the determination of this court, in substance as follows.

On August 11, 1887, Nathaniel P. Nutter, who carried on the business of tailoring in Boston, borrowed $1,000 of Harrison Chick, his uncle, for which he gave a promissory note, having previously, on August 5, executed to Chick a bill of sale of the stock of goods, fixtures, and other property in his store. On August 12, Nutter and Chick entered into a written agreement wherein Nutter agreed to buy at his own cost and keep in stock in his store an amount of goods equal in value to the stock then on hand, to pay the running expenses of the business, and, while the note remained unpaid, to keep at all times a stock of not less than $1,000 in value, with the understanding that all goods bought by him should be the property of Chick. The judge found that the instruments, though bearing different dates, constituted parts of one transaction; that they were never recorded; that no delivery of the property mentioned in the bill of sale was ever made by Nutter to Chick, but that it remained in the possession of Nutter; and that the goods were all made into garments and sold by Nutter in the regular course of his business, and other goods were bought by Nutter in his own name to place and keep in his store, and these again were made into garments and sold to customers, and so on; so that at the time of the assignment hereinafter mentioned the goods which Nutter had in the store were not the same as those covered

Digitized by Google

by and described in the bill of sale. The fixtures were the same. On October 28, 1896, Nutter executed to the defendant a common law assignment of all his property, including the stock of goods, fixtures, etc., then in the store, for the benefit of his creditors.

The judge ruled that no claim was established in favor of the plaintiff in the property replevied except in the fixtures, and as to all other property found for the defendant, and ordered a return to the defendant with damages, but found for the plaintiff in replevin for the fixtures.

If the rulings and findings or either of them were erroneous they were to be set aside, reversed, or modified, and such order entered as the court should determine; otherwise judgment was to be entered upon the findings.

*A. P. Worthen*, for the plaintiff.

*H. L. Baker*, for the defendant.

HOLMES, C. J. The bill of sale is shown to have been a mortgage by the agreement made as part of the same transaction. It is plain that if Nutter paid his note Chick was not to keep the goods. The only goods embraced by the instrument which were owned by Nutter at the time, and which are still on hand, are the fixtures. The rest is after acquired property. The instruments were not recorded, and possession was not taken by Chick of any part of the property before the assignment to the defendant and possession taken by him.

The old notion with regard to conveyances or mortgages of after acquired property was that they were simply void. Now such instruments are recognized as contracts, which on the acquisition of the property may operate as conveyances if they sufficiently identify the thing conveyed, and if other necessary conditions are satisfied. *Blanchard* v. *Cooke*, 144 Mass. 207, 225, 227. The other necessary condition, if they are not recorded, is that possession must be taken before other rights intervene. In this case we need not consider whether such an instrument could be recorded effectively after the chattels to which it applies have been acquired and the instrument begins to operate as a mortgage properly so called. It is settled that recording at an earlier date is not notice, and it may be that recording at the later moment would be equally ineffectual.

Digitized by Google

We express no opinion upon that. If it be true, then the only way in which the mortgagee can make his mortgage valid as against others than the mortgagor is by taking possession. The policy of the law is not to be evaded. In this case he neither recorded nor took possession.

The defendant was not a party to the mortgage. *Bingham* v. *Jordan*, 1 Allen, 373. It follows that the mortgage was not valid against him even as to the after acquired stock of goods, and, *a fortiori*, as to the fixtures. Probably the ruling of the Superior Court was based on *Wilson* v. *Esten*, 14 R. I. 621, which construed the assignment as purporting to be subject to the mortgage. We could not adopt a similar construction in the assignment before us. It specifies the goods.

Of course the plaintiff could not sustain his action of replevin on his right as creditor to avoid the conveyance to the defendant. That right he could assert by an attachment, but not by a naked election to declare the conveyance void in the interest of the earlier conveyance to himself, which the law postpones to the defendant's title. The same principle which makes the conveyance and delivery to the defendant good as against the mortgage at the moment when they were made keeps them good as against it. The fact that the later conveyance would give way to a still later attachment does not interfere with its priority over the mortgage.

*Judgment for the defendant.*

---

JACOB W. SEAVER & another, trustees, *vs.* EDWARD S. GRIFFING & another, assignees, & others.

Suffolk. December 4, 1899. — May 16, 1900.

Present: HOLMES, C. J., LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Trust — Principal — Income — Fund not passing to Assignees in Insolvency.*

A testator gave the residue of his estate to trustees "to collect the income thereof, and, after deducting the necessary expenses, to pay over the balance thereof as follows: To my wife, L., the sum of five thousand dollars a year during her natural life . . . to pay over the residue and remainder in equal shares to my

Digitized by Google

said children S., J., B., F., and W. In the event of the death of my said wife, L., I direct that the whole of the income shall be paid over to my said children [named] share and share alike. I direct that the lawful issue of a deceased child, or grandchild, shall take the parent's share by right of representation, but to continue in trust until they shall have arrived to the full age of twenty-one years, the income during minority to be applied for their support and education. In the event of the death of the issue of a deceased child before arriving to the full age of twenty-one years, I give . . . the principal and any accumulated interest thereon to my surviving children, share and share alike." There was also a provision that the daughters' share in the income should not be subject to the control of their husbands or be liable for their debts. The wife died in 1888 and the son F. in August, 1898, having just before been adjudged an insolvent debtor, and leaving four children. *Held*, that the assignees in insolvency of F. were not entitled to any part of the fund, but that a part of the principal of the fund, proportionate to the share of the income received by F. during life, should be divided into four parts, one to be transferred to the oldest child, who had reached his majority, and the other three to be set aside, one for each of the three children, and to be severally held in trust during the minority of each child, and to be transferred to him or her upon coming of age.

BILL IN EQUITY, by the trustees under the will of George F. Weld, asking for the construction of the fifth paragraph thereof.

By this paragraph the testator gave the residue of his estate to trustees "to collect the income thereof, and after deducting the necessary expenses, to pay over the balance thereof as follows: to my wife Lydia Weld the sum of five thousand dollars a year during her natural life in equal quarterly payments of twelve hundred and fifty dollars each, to pay over the residue and remainder in equal shares to my said children Sarah A. Seaver, James G. Weld, Julia R. Bradlee, Franklin Weld and Samuel M. Weld. In the event of the death of my said wife Lydia Weld I direct that the whole of the income shall be paid over to my said children, Sarah, James, Julia, Franklin, and Samuel share and share alike. I direct that the lawful issue of a deceased child, or grandchild, shall take the parent's share by right of representation, but to continue in trust until they shall have arrived to the full age of twenty-one years, the income during minority to be applied for their support and education. In the event of the death of the issue of a deceased child before arriving to the full age of twenty-one years, I give, devise, and bequeath the principal and any accumulated interest thereon to my surviving children share and share alike. My will is that my daughters' share in said income shall be so held and paid over that the same shall not be subject to the control of their

Digitized by Google

husbands (except such as is herein given), or be liable for debts or engagements of their contracting, but shall from time to time be paid over to them upon their sole and separate receipt."

The testator died in 1875, leaving his wife and five children surviving; the wife died in 1888, and his son Franklin Weld died in August, 1898, having been adjudged an insolvent debtor a few months prior to his decease. Franklin Weld left four children surviving him, George F. Weld, Stanley Barton Weld, Lydia G. Weld, and Julia R. Weld, the first-named only having reached the age of twenty-one years; and the question presented for decision is whether any share in the principal of the trust estate belongs to the assignees in insolvency of Franklin Weld.

*Holmes*, C. J., reserved the case for the consideration of the full court.

*N. P. Dodge, Jr.*, for the trustees, read the papers in the case.

*H. Wheeler*, for the children of Franklin Weld.

*J. Willard, guardian ad litem*, for Carley Gould Weld, a minor, a child of Samuel M. Weld.

*A. P. Thom*, (of Virginia,) (*M. M. Weston* with him,) for the assignees.

LORING, J. We are of opinion that the assignees in insolvency of Franklin Weld are not entitled to any part of the fund created by the fifth article of the will of George F. Weld.

"The general principles which apply to the construction of a clause similar to the one in question are well settled. While care must be taken that courts do not undertake to make wills for testators, and while their meaning is not to be ascertained by mere conjecture as to what they may have intended, the true meaning of words used is to be arrived at by considering them in their relation not only to the clause immediately in question, but to the whole will. Their more grammatical or ordinary sense is not to be adhered to, if it would be repugnant to or inconsistent with the remainder of the instrument. Where there has been a failure also in such a clause to use the technical or positive language appropriate to express a meaning which is evident from the whole will taken together, and where the language for that purpose is defective, necessary words may be supplied, or words may be transposed to effectuate the obvious

Digitized by Google

intention." *Devens*, J., in *Boston Safe Deposit & Trust Co.* v. *Coffin*, 152 Mass. 95, 98.

It is plain that the clause, "to pay over the residue and remainder in equal shares to my said children," naming them, is a direction as to the payment of the balance of the income left after paying his widow $5,000 a year. The statement in the will of the trust, on which this property is held, begins by providing that the property is to be held in trust "to collect the income thereof, and, after deducting the necessary expenses, to pay over the balance thereof as follows: to my wife Lydia Weld the sum of five thousand dollars a year;" and then comes the clause in question.

The next clause is a clause which professes to deal with the income; it is in terms a disposition of "the whole of the income," and the disposition made of "the whole of the income," "in the event of the death of my said wife," is that there shall be an equal division of it among his children, naming them.

The next clause is the clause which gives rise to the controversy in this case, and it is as follows: "I direct that the lawful issue of a deceased child or grandchild shall take the parent's share by right of representation, but to continue in trust until they shall have arrived to the full age of twenty-one years, the income during minority to be applied for their support and education."

The children of Franklin Weld contend that the words, "I direct that the lawful issue of a deceased child or grandchild shall take the parent's share by right of representation," constitute a gift of the principal; the assignees of Franklin Weld contend that this clause is in terms a substitutional gift to the children of what was given to their parents; that the words used mean that and can mean nothing else. The children say that this is a gift to the issue of a deceased child or grandchild, of such portion of the principal as corresponds to the share its ancestor (the testator's child or grandchild) had in the income; the assignees contend that there is no gift of the principal except the substitutional gift contained in the next clause (which is hereinafter set forth but which does not affect this question), and that the parents are entitled to the principal by virtue of the clause disposing of "the whole of the income" under the

Digitized by Google

doctrine of *Chase* v. *Chase*, 132 Mass. 473; and further, that, since the principal is thus construed to be given to the parents, and since this is a substitutional gift to issue of their parents' share, it must be a gift of what their parents would have had, had they survived the testator, under the rule in *Briggs* v. *Shaw*, 9 Allen, 516. The subsequent clause disposing of the principal referred to above is as follows: "In the event of the death of the issue of a deceased child before arriving to the full age of twenty-one years, I give, devise, and bequeath the principal and any accumulated interest thereon to my surviving children, share and share alike." The doctrine of *Chase* v. *Chase*, on which the assignees rely in support of their contention that the gift to the children of "the whole of the income" carries the principal, is that a gift of the use, income, and improvement of specified personal property will be construed to be a gift of the principal thereof, to avoid holding that there is a partial intestacy, where there is no other clause in the will which can be construed to be a gift of the principal. The rule in *Briggs* v. *Shaw* is that where a gift which is explicitly a gift of the principal is followed by a gift over in the event of the death of the first legatee, the second gift is construed to be a gift in case the first legatee dies before the testator; that is to say, to avoid holding that the first gift is cut down to a life estate in the teeth of the language of the clause by which the first gift is bequeathed, the second gift is construed to be a gift in case the first legatee dies before the testator, and the words "before the testator" are read into the will.

It is not fair, in construing Mr. Weld's will, to assume that the clause disposing of "the whole of the income" gives a fee to the children, because it would have done so had the will ended there and not contained the clause which the grandchildren of the testator contend is a gift of the principal, and then to apply the rule, which, to avoid cutting down to a life estate a gift which is in terms a gift in fee, reads into a clause, "in case the first legatee dies," the words, "before the testator."

The question on which the construction of this will depends, when fairly put, is this: Taking the two clauses together, is the first clause to be construed to be, what it is in terms, a gift of the income and the second to be a gift of the principal, on

Digitized by Google

the one hand; or, on the other hand, is the second clause to be construed to be, what it is in terms, a substitutional gift, and the first clause, for that reason, to carry the principal, in spite of the fact that it is in terms limited to "the whole of the income"? In short, the choice lies between giving full effect to the words, "the whole of the income," in the first clause, on the one hand; and, on the other hand, giving to the words, "the parent's share by right of representation," in the second clause, their strictly technical meaning.

We are of opinion that full effect must be given to the words, "the whole of the income," in the first clause; and that this testator did not use the words, "the parent's share by right of representation," in their strictly technical sense to mean that the issue should have only what their parents would have had, thereby adopting a construction which makes it necessary to read into the will the words, "if they had survived the testator"; but we think that the testator meant, by using these words, to provide that the issue should have that portion of the principal which is proportionate to the share their parent had in the income. It is not uncommon in ordinary conversation to speak of the share in an estate, of which A. B. has the income for his life, as A. B.'s share in that estate; and in construing this will, which is not well drawn and which bears on its face the marks of having been written by one who had some familiarity with legal phrases, but who had no adequate knowledge of their import, as in *Foster* v. *Smith*, 156 Mass. 379, 382, 383, we think that we must give full effect to the words, "the whole of the income," rather than give their strictly technical meaning to the words, "the parent's share by right of representation." This conclusion is enforced by the provision at the end of this article of the will, where the testator provides that "my daughters' share in said income" shall not be subject to the control or to the debts of their husbands; this reference to the interest given to his daughters as a "share in said income" shows that the testator supposed that, by the previous provisions of the same article, the daughters had been given a share in the income and not a share in the principal, as the assignees contend.

There is another possible construction of the fifth article under which the assignees would take an interest, and that is

Digitized by Google

this: If the contention of the children of Franklin Weld is conceded, that the gift to the children of the testator is a gift of the income, and if the contention of the assignees is conceded, that the gift to the "lawful issue of a deceased child or grandchild" is a substitutional gift, the only gift over of the principal is that contained in the clause, "in the event of the death of the issue of a deceased child before arriving to the full age of twenty-one years, I give, devise, and bequeath the principal and any accumulated interest thereon to my surviving children, share and share alike." If this construction is the true one, the children of the testator had a life estate; in case they died before the testator, their issue had a life estate; in case a grandchild died before attaining its majority, "the principal" was bequeathed to the surviving children of the testator, and the testator died intestate as to the principal of the residue of his estate, except so far as the gift over of "the principal" just referred to in fact takes effect.

But it is plain, taking the whole will together, that the testator intended to dispose of his whole estate, and did not intend to leave the principal of the residue of his estate practically undisposed of. Under this construction the principal of the whole residue is practically undisposed of, for it is disposed of only in case one of his children dies before him and leaves a child who dies before coming of age, and in that contingency only that portion of the residue is disposed of, the income of which went to the support of that child during its minority; it is inconceivable that the testator intended to dispose of the principal in that one contingency and not to make any disposition of it, if that remote contingency did not occur. This is decisive of the matter. *Metcalf* v. *Framingham Parish*, 128 Mass. 370. *Phelps* v. *Phelps*, 148 Mass. 570. *Hood* v. *Boardman*, 148 Mass. 330.

But apart from that general consideration, there are greater difficulties in dealing with the words used by the testator if that construction is adopted than are encountered under the construction of the will which we have adopted as the true one. On that construction no effect is given to the following clause in the gift to the lawful issue of a deceased child or grandchild, namely, "but to continue in trust until they shall



Digitized by Google

have arrived to the full age of twenty-one years, the income during minority to be applied for their support and education." If this gift is a substitutional gift of income to the issue of children who die before the testator, it is *ex vi termini* a gift of an interest which is to remain in trust during the several lives of the respective children who become entitled under it; and the clause that it "is to continue in trust until they shall have arrived to the full age of twenty-one years" is not only superfluous but is read out of the will. This clause, providing that the subject of the gift, whether principal or income, is not to remain in trust after the issue reach twenty-one years, shows that the subject of that gift cannot be a life interest in a trust estate, and the conclusion is inevitable that the subject of it is the principal, to the income of which the child in question was entitled for its support during its minority. And again, the gift over of principal, which, on this construction, is the only gift over of principal contained in the will, is not intelligible unless words are added to the will limiting it to that portion of the principal, to the income of which the child so dying would have been entitled; that is to say, reading into the will words almost similar to the only words which have to be read into it under the construction which we have adopted.

We are, therefore, of opinion that a part of the principal of the trust fund, proportionate to the share of the income received by Franklin Weld during his lifetime, is now held in trust for his four children, and should be divided into four parts: one part should be transferred to George F. Weld, who has reached the age of twenty-one years; the other three parts should be set aside, one for each of the other three children, and should be severally held in trust during the minority of each child, and transferred to it upon its coming of age.

*Decree accordingly.*

Digitized by Google

## LAWRENCE McGINNIS, JR. *vs.* INHABITANTS OF MEDWAY.

Norfolk. December 13, 1899. — May 16, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Recovery of Money paid for Licenses — Agency.*

A person who receives a license for the sale of intoxicating liquors must be assumed to have taken it upon the conditions of Pub. Sts. c. 100, and the acts in amendment thereof, so far as respects his rights upon a revocation of the license; and there is no provision in any such statute authorizing a recovery in a case where the license not void in its inception is revoked on the ground that notices of the application were not posted on the premises described in the application as required by the sixth section of the statute.

Although the question whether licenses shall be granted in any city or town is determined by the vote of the inhabitants thereof, still the licensing board, whether a special commission or the mayor and aldermen or the selectmen, do not act as the agents of the city or town, but as public officers specially designated in that behalf, and, in the absence of any statute to the contrary, the city or town is not answerable for their acts as such officers.

CONTRACT, to recover $2,300 paid for licenses of the first and fourth classes. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

*T. E. Grover & R. G. Fairbanks*, for the plaintiff.

*L. E. Fales & W. G. Pond*, for the defendant.

HAMMOND, J. The licenses issued by the plaintiff under Pub. Sts. c. 100, by the selectmen of the defendant town having been revoked on the ground that notices of the applications were not posted on the premises described in the applications as required by the sixth section of that statute, the plaintiff brings this action to recover the amount paid by him for the licenses, on the ground that he, supposing that the law as to posting such notices had been complied with, paid the money under a mistake of fact. He further claims that the money is wrongfully kept by the town, and that the selectman who made the mistake was the agent of the town.

It appears that, there being no newspaper printed in the town, the board of selectmen gave one of its members the

Digitized by Google

notices issued by them upon said applications, to post on the premises. He, however, did not post any of them on the premises, but did post them on land adjoining. In due time the plaintiff paid to the town treasurer the license fees, and received his licenses. It is fair to assume that within thirty days from the time the money was paid to the treasurer, in compliance with the law he paid one fourth of the money to the treasurer of the Commonwealth.

Although the question whether licenses shall be granted in any city or town is determined by the vote of the inhabitants thereof, still the licensing board, whether a special commission, or the mayor and aldermen or the selectmen, do not act as the agents of the city or town, but as public officers specially designated in that behalf, and, in the absence of any statute to the contrary, the city or town is not answerable for their acts as such officers. The license is not granted by the city or town, but by the State acting through its duly appointed officers.

It is to be noted that we are not dealing with a case where from its very inception the license was a nullity. These licenses were issued by the proper tribunal, acting within its jurisdiction and having the power to issue them. Nor were they defective in form, as was the case in *Commonwealth* v. *McCormick*, 150 Mass. 270, and in *Commonwealth* v. *Merriam*, 136 Mass. 433, but on the contrary they appeared on their face to be regular and legal in every respect. They were a full and legal protection to the licensee until revoked under the statute, and they could not be so revoked for the cause for which they were actually revoked except by a court acting in proceedings instituted directly for that purpose under the provisions of the sixth section of the statute. Pub. Sts. c. 100, §§ 6, 16.

The plaintiff for several days enjoyed the privileges of these licenses, and to that extent was benefited.

It is provided by Pub. Sts. c. 100, § 5, that every license "shall name the person licensed, shall set forth the nature of the license and the building in which the business is to be carried on, and shall continue in force until the first day of the May next ensuing, unless sooner forfeited or rendered void"; and the published notice of the application shall set forth substantially the same things. § 6. The license when granted is subject to

Digitized by Google

several conditions, for a breach of any one of which it may be forfeited. § 9, cl. 7. The statute provides for the forfeiture or revocation of a license for various other causes. §§ 16, 23.

The license is a personal privilege. If granted to an individual, except as otherwise provided it expires with his life. Again, the building in which the business is to be carried on may be totally destroyed by fire and the rooms described in the license cease to exist. It would occur to any person upon the most superficial reflection that from these and other causes a license in many cases would be likely to cease to be operative long before the "first day of May next ensuing." There is evidence in the act itself and in some of the amendments subsequently made that the advisability of refunding a part of the license fee where the license is terminated without the fault of the licensee was, at the time of the passage of the act, and since has been drawn to the attention of the Legislature; and cases in which it is intended that there shall be a repayment to the licensee of a part of the license fee, at least where the license is not absolutely void, have been specifically described.

Under Pub. Sts. c. 100, there was only one case where the money was to be refunded, and that was the one described in the seventh section. It is instructive in this connection to compare the sixth and seventh sections.

The sixth section provides among other things that under certain circumstances a notice of the application shall be posted upon the premises described in the application for the license, and, further, that if a license is granted without thus posting the notice, any citizen of the "city or town within which such license is issued may make complaint before the police, district, or municipal court, or the trial justice having jurisdiction therein; and if after due hearing it appears that such notice was not given, the court or justice shall revoke the license, and notice thereof shall be sent to the board issuing the same." The licenses to the plaintiff were revoked under this section.

The seventh section provides that if within ten days from the publication of the notice required by the sixth section an owner of any real estate "adjoining" (since changed to "within twenty-five feet of," see St. 1887, c. 323) the premises described in the application notifies the licensing board in certain cases

Digitized by Google

that he objects to the granting of the license, no license to sell intoxicating liquor to be drunk on the premises shall be granted. And in case such a license be granted after such objection has been filed, the owner of any such real estate may apply to a court or magistrate; and thereupon, after proceedings which are similar to those described in § 6, the license shall be revoked and notice thereof sent to the licensing board; "and any city or town in which any such license has been so revoked shall refund to said licensee or his legal representatives the money expended by him for said license and his court fees and costs."

Here, in plain and explicit language, is imposed upon the city or town the legal liability to refund the license fee with certain other expenses, and in the whole statute, as enacted in the Public Statutes, there is not another word about refunding to the holder of a revoked license the whole or a part of the license fee, whatever may be the cause of revocation.

And notwithstanding the numerous amendments to this statute which have since been made, this feature of it has been preserved except in two cases. The first is where a registered pharmacist has died or become incapacitated, and his business is continued by his widow, executor, or administrator under a registered pharmacist; St. 1893, c. 472, § 5; St. 1896, c. 397, § 12; and the second is where, on the death of a licensee before the expiration of the term for which the license was granted, the city or town which granted the license may refund to his administrator or executor a part of the license fee "proportionate to the unexpired term of the license. And a proportionate part of the percentage paid to the Commonwealth shall be refunded to the city or town." St. 1897, c. 227, § 1.

The difference between the condition of a licensee whose license is revoked under Pub. Sts. c. 100, § 6, and that of one whose license is revoked under § 7, is very marked and is very suggestive. Where, as in § 7, the irregularity consists in the act of the licensing board in not giving heed to a lawful objection, the licensee is not made to suffer; but where the irregularity consists in not having the proper notice posted on the premises to be licensed, there is no provision for a recovery upon the revocation of the license.

It is to be inferred that it was intended by the Legislature that

Digitized by Google

the licensee himself should see to it at his peril that this act of posting which is to be done at his own expense (§ 6) is properly done.

A license fee is not a tax imposed upon a citizen *nolens volens*. He is not compelled to apply for a license, or to take one if the licensing board are willing to grant him one. If he takes it, he takes and holds it subject to the conditions imposed by law. Unless absolutely void at its inception it is valid until revoked, and he takes his chances about its revocation, whether he be at fault or not, and he must be assumed to have consented to stand in the case of a revocation where the statute leaves him, as respects his right to recover a part or the whole of the license fee.

There being no provision in the statute for the recovery by the plaintiff, the order must be *Judgment affirmed.*

---

## MARY ROCHE *vs.* MARY H. SAWYER.

Suffolk. January 11, 1900. — May 16, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Personal Injuries — Negligence — Action against Landlord by Visitor of Tenant — Condition of Way.*

An action cannot be maintained against a landlord for personal injuries occasioned to a visitor of one of the tenants by falling into an opening or cellar way while passing along a walk separating the two rows of tenements, if the walk was in good repair and in the same condition in which it was when the tenant hired his tenement, and the danger arising from the proximity of the opening was not concealed but apparent. The plaintiff being the guest of the tenant and using the walk under his authority had no greater claim to protection than he had.

TORT, for personal injuries sustained by the plaintiff on premises owned by the defendant by falling into an opening or cellar way. At the trial in the Superior Court, before *Gaskill*, J., it appeared that on the premises, which were situated on Second Street, in East Cambridge, were two blocks of wooden houses, each block eighty-three feet long, separated by a way or court called Second Street Court; that this court led from Second

Digitized by Google

Street to an alleyway in the rear communicating with another public street; that it was twenty feet wide and on approximately the same level as the sidewalk of Second Street; that on the line between the court and the sidewalk of Second Street were two posts, each approximately five feet from the sides of the court, and approximately ten feet apart; that there were three tenements in each block; that each of these had an entrance door on the court; that these doors opened in the second story at a height of four feet four and one half inches from the ground, and were each reached from the court by a flight of steps with a platform at the top; that in the first or westerly tenement on the left or northerly side there was also a basement entrance with an opening three feet wide, five feet six and one half inches long, and two feet one and one half inches deep, and entered by three steps on the inner or easterly side; that on the southerly side of this opening was a wooden sill eight and one half inches wide and three inches above the level of the court; that on each side of the court was a plank walk one foot eight and one half inches wide, leading from the sidewalk of Second Street by the tenements to the back of the court, and intended for the use of the persons passing along the court; that at the point where the northerly plank walk passed the basement entrance to tenement No. 1, there was a space of about three and one half inches between its inner or northerly edge, and the outer or southerly edge of the sill, forming the outer side of the opening; that the top of the walk was at this point three inches from the level of the ground, so that between the sill and the walk there was a space three and one half inches wide and three inches deep; that there were no artificial lights in the court, and the nearest street light was an electric light on the opposite side of Second Street, and one hundred and thirty-five feet south of the southerly side of Second Street Court; that the six tenements in the court were leased by the defendant to different tenants by oral leases, the defendant making all repairs, and retaining control of the court and the outside of the buildings; that the construction of the buildings and the basement entrance of tenement No. 1 had not been changed since the tenements were hired by the persons occupying them at the time when the plaintiff received her injuries, nor had there ever been any lights in the court;

Digitized by Google

that the plank walk on the left or northerly side of the court and the court itself were in the same condition when the plaintiff received her injuries as when the tenements were hired, and the walk was in good repair and good condition to be walked on, and that the only entrance to the tenements was through Second Street Court.

The plaintiff offered evidence tending to show that on March 10, 1898, she went to Second Street Court to visit Mrs. Grady, the wife of one of the defendant's tenants, who occupied the easterly tenement in the northerly block; that she and Mrs. Grady were intimate friends, and that Mrs. Grady had repeatedly asked the plaintiff to come and visit her at her tenement during all the time she had occupied it; that from September, 1897, to January 8, 1898, Mrs. Grady had visited the plaintiff at the plaintiff's home every week; that she reached the Grady tenement at about 6 P. M., remaining until ten minutes to seven, when she left; that it was very dark; that there were no lights in any of the houses on the court; that in the middle of the court there was a little icy snow; that the plaintiff knew nothing about the construction or condition of the court except that she had followed a plank walk some little distance in going in to Mrs. Grady's; that when she left the tenement she started to walk along the northerly plank walk to reach Second Street, accompanied by Mrs. Grady and her daughter, who were going to see her to her car; that she was using an umbrella, which she carried, as a cane; and that when she reached a point on the plank walk just opposite tenement No. 1 she fell into the cellar opening, there situate, and sustained the injuries complained of.

The court, at the close of the plaintiff's evidence, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

*A. D. Hill*, for the plaintiff.

*P. H. Cooney*, for the defendant.

HAMMOND, J. The walk was in good repair, and in the same condition in which it was when Grady hired his tenement. If it was dangerous at all to a person in the exercise of due care, the danger arose out of its original construction and not from lack of repair. The danger arising from the proximity of the

Digitized by Google

basement entrance was not concealed, but was apparent. Nor was the entrance a trap or pitfall. *Hutchinson* v. *Cummings*, 156 Mass. 329, 330. Everything was plainly visible and in the same condition as when hired.

Grady got and had the benefit of the tenement he hired, including its approaches, and had no right to insist on anything better. His rent must be assumed to have been gauged in accordance with the thing he hired and its condition at the time.

The case is plainly distinguishable from the cases where the landlord has been guilty of negligence respecting the repair of a common stairway or other part of a building used in common and remaining under his control, as in *Looney* v. *McLean*, 129 Mass. 33, and *Wilcox* v. *Zane*, 167 Mass. 302; and also from the cases where parts of a building are let to separate tenants for business purposes, and persons call upon the tenants upon business of mutual interest to the caller and the tenant, as in *Marwedel* v. *Cook*, 154 Mass. 235. Neither Grady nor any member of his family, nor any of his house servants, if injured by a similar accident, could have maintained such an action against the defendant for the injury. *Quinn* v. *Perham*, 151 Mass. 162. *Moynihan* v. *Allyn*, 162 Mass. 270, and cases therein cited. *Freeman* v. *Hunnewell*, 163 Mass. 210.

The plaintiff was using the walk as the invited guest of Grady, under his authority and in the exercise of his right, and while she was thus using it the defendant's duty to her was no greater than that which he owed to Grady. See *Coupe* v. *Platt*, 172 Mass. 458; *Plummer* v. *Dill*, 156 Mass. 426.

*Exceptions overruled.*

Digitized by Google

## MARY A. HOLLERAN *vs.* CITY OF BOSTON.
## MARGARET L. KELLY, executrix, *vs.* SAME.

Suffolk. January 12, 1900. — May 16, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Park Commissioners — Action — Damages — Surface Water — Discharge of Contents of Drain — Statute.*

The remedy for damages to property for changes in the flow of surface water caused by certain acts of the park commissioners of the city of Boston and of the city itself, and also for discharging the contents of an old cellar drain from a building within the park limits, is under St. 1875, c. 185, and not by an action of tort.

TWO ACTIONS OF TORT, for damages to the plaintiffs' properties. The writ in the first case was dated July 5, 1894, and in the second case July 7, 1894. At the trial in the Superior Court, before *Aiken*, J., the plaintiffs offered evidence tending to prove that in 1891 the park commissioners made substantial changes in the natural surface of Franklin Park in the vicinity of Glen Way, upon which street the plaintiffs' properties abutted, building artificial embankments and roadways, and changing the natural grade substantially within the park limits; that these changes increased the watershed which theretofore had discharged into a small natural watercourse, which had its origin in a swamp hole or small pond within the limits of the park, and which stream had discharged for many years under Blue Hill Avenue through a culvert which had been there for many years before the time in question; that the water which was discharged through the culvert before the defendant made the changes in Franklin Park flowed down in a small natural watercourse near to the properties of the plaintiffs, but before the time complained of had caused them no damage; that some time before the date of the writs, about 1891 or 1892, the city constructed in Blue Hill Avenue, a public way, two catch basins, which were connected with each other by an eight or ten inch pipe, both of which were connected by the city by a similar pipe with the culvert already spoken of; that at certain seasons of

Digitized by Google

the year the discharge of surface water from the street and from the Franklin Park territory was so great that, when discharged through the catch basins into the old culvert, the water overflowed the natural banks of the small stream below Blue Hill Avenue, and flowed on to their lands; that an old cellar drain which came from the so called Gleason house, within the park limits, discharged its contents so near Blue Hill Avenue that the drainage from it, in part at least, was discharged into the catch basins before mentioned, and from there into the old culvert; and that the discharge from the Gleason drain into the culvert was in consequence of the alteration made in the surface of Franklin Park by the park commissioners.

They also offered evidence tending to prove that no action was taken by the city under St. 1873, c. 205, with reference to the use of the culvert or watercourse before mentioned.

Upon this offer of proof the judge directed the jury to return a verdict for the defendant in each case; and the plaintiffs alleged exceptions.

*G. R. Swasey*, for the plaintiffs.

*S. M. Child*, for the defendant.

HAMMOND, J. The plaintiffs in these actions of tort seek to hold the defendant answerable in damages for changes in the flow of surface water caused by certain acts of the park commissioners and of the defendant, and also for discharging the contents of an old cellar drain from the Gleason house within the park limits.

1. As to the changes caused by the park commissioners. Under St. 1875, c. 185, § 3, these commissioners are authorized to take land in fee for park purposes, and to lay out and improve the same; and by the fifth section a remedy is given to all persons who sustain damages by the taking of land or "by other acts" of the commissioners.

There is nothing in the evidence offered by the plaintiffs to warrant a finding that, in making the changes within the park, the commissioners exceeded their authority. It is therefore too plain for discussion that the remedy for damages thus caused is by proceedings under the statute and not by an action of tort. As to the drainage of the house, it does not appear that such drainage appreciably affected the quantity or quality of the water in

Digitized by Google

the brook. See *Bainard* v. *Newton*, 154 Mass. 255, and cases cited.

2. As to the disposition of the surface water by changes within the limits of the highway. The drains and catch basins were for the purpose of aiding in removing the surface water from the highway, and there is nothing in the evidence offered by the plaintiffs to show that they were not properly constructed.

It is well settled in this Commonwealth that, if a town in the performance of its duty to keep a highway safe and convenient for travel diverts the surface water upon the neighboring land, it is not answerable in tort; and this is the rule even where the water is gathered into artificial channels before passing from the highway or where it is drained into a watercourse. The remedy is under the statute. *Flagg* v. *Worcester*, 13 Gray, 601. *Turner* v. *Dartmouth*, 13 Allen, 291. *Kennison* v. *Beverly*, 146 Mass. 467, and cases cited.

We are of the opinion that these cases are governed by the principles above declared, and that they are clearly distinguishable from *Emery* v. *Lowell*, 104 Mass. 13; *Boston Rolling Mills* v. *Cambridge*, 117 Mass. 396; *Manning* v. *Lowell*, 130 Mass. 21; *Bates* v. *Westborough*, 151 Mass. 174, and other similar cases upon which the plaintiffs rely. *Exceptions overruled.*

---

WILLIAM W. DALLINGER *vs.* GEORGE F. RICHARDSON & another, executors.

SAME *vs.* SAME.

Middlesex. January 15, 1900. — May 16, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Action against Executor for Taxes — Domicil — Effect of Adjudication of Probate Court — Estoppel of Record — Estoppel in pais.*

A person domiciled in this Commonwealth who, upon his appointment to a judicial office under the government of the United States, resigns a judicial position held by him here, sells his house situated in C. in this Commonwealth, erects a house in Washington, lives there and holds his judicial office continuously for over twenty years and until his death, buys a burial lot there and causes several

Digitized by Google

members of his family to be buried therein, may be found, in an action against his executor to recover taxes assessed in C. on his personal estate after his death, not to have been an inhabitant of C. at the time of his death, although after his removal from C. he described himself in various deeds and in his will as of C., and declared orally that he had not given up his residence therein, and although by the petition for the probate of his will and by the decree thereon he was described as an inhabitant thereof.

An adjudication of the Probate Court upon the question of the residence of a testator at the time of his death is conclusive under the Pub. Sts. c. 156, § 4, so far as respects its own jurisdiction, but is not conclusive upon that question if it is in controversy in another tribunal in a matter not involving the validity of an order or decree of the Probate Court, or some proceeding thereunder.

An executor against whom an action is brought to recover taxes assessed in C. upon the estate of his testator is not estopped of record to deny the residence of his testator in C. by an adjudication of the Probate Court admitting the will to probate that the testator was an inhabitant of C.; nor is he estopped therefrom *in pais* by a statement in writing to the assessors of taxes of C. after the assessment of the taxes that the estate had been paid over and was no longer in his possession, if there is no evidence that the statement was made with the intent that the assessors should rely, or that they did rely, thereon.

TWO ACTIONS OF CONTRACT, by the collector of taxes of the city of Cambridge, to recover the taxes assessed upon the personal property of the defendants' testator, under the provisions of Pub. Sts. c. 11, § 20, cl. 7. Trial in the Superior Court, without a jury, before *Maynard*, J., who reported the case for the determination of this court, in substance as follows.

The defendants' testator, William A. Richardson, died in Washington, D. C., on October 19, 1896, leaving a will in which he described himself as "a citizen and inhabitant of Cambridge in the county of Middlesex and Commonwealth of Massachusetts." The defendants applied to the Probate Court for the county of Middlesex for probate of the will by a petition which described the deceased as "William A. Richardson, who last dwelt in Cambridge," and the decree admitting the will to probate described the testator as "late of Cambridge." Evidence was offered and admitted, subject to the exception of the plaintiff, that the deceased was born, educated, and admitted to the bar in this Commonwealth; that he resided for several years in Lowell, during which time he held offices under the city and the Commonwealth; that he was appointed judge of probate and insolvency for the county of Middlesex, and then removed his residence to Cambridge, where he acquired a domicil and lived in a house which he owned. In 1872 he was appointed assist-

Digitized by Google

ant secretary of the treasury of the United States, and resigned his office of judge of probate and insolvency. In 1873 he was appointed secretary of the treasury. While holding the two offices last named he retained his domicil and residence in Cambridge. In 1874 he was appointed a judge of the Court of Claims, and held that office until 1885, when he was appointed chief justice of the same court, and continued to hold that office until his death. In 1875 the deceased sold his house in Cambridge, and thereafter had no property of any kind in that city, performed no acts of citizenship therein, never remained there over night, and visited it only three or four times when he attended the reunion of his class on Commencement Day at Harvard University, and when he deposited his will in the registry of probate. In 1885 he erected a house in Washington, where he lived with his family until his death. He also purchased a burial lot there, in which the bodies of members of his family were buried. He told the register of probate for the county of Middlesex, in June, 1892, that he had never given up his residence in Cambridge, and did not consider himself a resident of Washington, and he made some other declarations tending to show that his domicil was in Washington. The defendants, after the assessment of the taxes, gave notice in writing to the assessors of Cambridge that pursuant to an order of the Probate Court they had paid over the estate of the testator to trustees appointed under the will by the Supreme Court of the District of Columbia, and that they had no property whatsoever in their possession as executors, nor had any part been paid or distributed to any persons who were inhabitants of Massachusetts.

The plaintiff offered in rebuttal of the foregoing evidence various conveyances of land by the deceased between 1885 and 1896, in which he described himself as "of Cambridge, Massachusetts, Chief Justice of the Court of Claims at Washington, D. C.," and a receipt given to him upon the deposit of his will in the registry of probate in which he was described as of Cambridge.

At the close of the evidence the plaintiff requested the judge to rule, 1. That the plaintiff is entitled to recover; 2. That the domicil of the testator at the time of his death was in Cam-

Digitized by Google

bridge; 3. That the defendants are estopped to deny that the residence of the deceased was not in Cambridge.

The judge declined so to rule, and the plaintiff excepted. The judge found that "for many years prior to and up to the time of his death he (the testator) had the intention and purpose of not returning to Cambridge to live, but of always remaining, living, and having his home in Washington," ruled that the testator was not an inhabitant of Cambridge at the time of his death, and found for the defendants.

If the evidence was admissible, and the finding and ruling were correct, judgment was to be entered on the finding.

*G. A. A. Pevey*, for the plaintiff.

*W. H. Moody*, (*F. N. Wier* with him,) for the defendants.

HAMMOND, J. Upon the evidence the court was justified in finding that for many years prior to and at the time of his death the only home of the testator was in Washington, and that "for many years prior to and up to the time of his death he had the intention and purpose of not returning to Cambridge to live, but of always remaining, living, and having his home in Washington"; and upon these and the other facts found as stated in the report, the ruling that the "testator was not an inhabitant of Cambridge at the time of his death" was correct, and the ruling must stand as the law of the case unless the proceedings which have taken place in the Probate Court of Middlesex County conclusively show that for the purposes of this case the residence of the testator at the time of his death must be regarded as in Cambridge. The plaintiff contends that those proceedings are thus conclusive, and that parol testimony is inadmissible to vary or contradict the record.

For the purposes of this discussion we assume without deciding that it sufficiently appears by the record of the Probate Court that the court found that the residence of the testator was in Cambridge, and that jurisdiction was assumed upon that ground.

Prior to Rev. Sts. c. 83, § 12, where, upon a petition for administration, the Probate Court had adjudicated upon the place of residence of the deceased, and upon that adjudication had assumed jurisdiction and proceeded to the settlement of the estate, the true place of residence was open to inquiry in collateral proceedings, even though such an inquiry should result in

Digitized by Google

showing that the adjudication was wrong and the subsequent proceedings were all void for want of jurisdiction. The authorities on this are reviewed, and the reasons for the rule are stated in *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87.

Rev. Sts. c. 83, § 12, with some unimportant changes, is now Pub. Sts. c. 156, § 4, and is as follows: "The jurisdiction assumed in any case by the court, so far as it depends on the place of residence of a person, shall not be contested in any suit or proceeding, except in an appeal in the original case, or when the want of jurisdiction appears on the same record." Doubtless this provision was inserted in the Revised Statutes in consequence of several prior decisions of this court, such as *Cutts* v. *Haskins*, 9 Mass. 543, where the law as then existing seemed sometimes to work hardship to innocent persons. See note to this section by the commissioners on the Revised Statutes.

Since this statute, whenever there appears upon the record of the Probate Court an adjudication, whether in accordance with the truth or not, as to the residence of a person, the jurisdiction of the court, so far as it depends upon that question, is conclusively presumed in any proceeding involving the validity of any order or decree of the court, or of any proceedings thereunder. In the case now before us that rule is applicable to the defendants. They cannot deny the validity of their appointment as executors, nor that if the plaintiff's claim is due they are answerable for it. *McFeely* v. *Scott*, 128 Mass. 16. *Derome* v. *Vose*, 140 Mass. 575. *Cummings* v. *Hodgdon*, 147 Mass. 21. It is to be noted, however, that the thing which cannot be contested is the jurisdiction of the court, and that the statute does not say that the place of residence shall not be contested in any other proceeding.

The taxes upon which this suit is brought were assessed by the assessors of Cambridge under Pub. Sts. c. 11, § 20, cl. 7, the material parts of which are as follows: "The personal estate of deceased persons shall be assessed in the place where the deceased last dwelt. Before the appointment of an executor or administrator it shall be assessed in general terms to the estate of the deceased, and the executor or administrator subsequently appointed shall be liable for the tax so assessed in like manner as though assessed to him."



Digitized by Google

The assessment of taxes upon deceased persons is not the act of the Probate Court, and the taxes may be assessed whether the court appoints an executor or not. If the tax were assessed by the court as a part of the settlement of the estate, then in proceedings to enforce it the jurisdiction of the court, so far as respects residence, would be conclusively presumed.

But the tax is not assessed by the Probate Court, and the question of its validity involves no inquiry into the jurisdiction of the court. The adjudication of the Probate Court as to residence is conclusive so far as respects its own jurisdiction, but no further. It cannot be held to shut off all inquiry into the question of residence when that question is being investigated by another tribunal, in a matter not involving the validity of any order or decree of that court or some proceeding thereunder.

Under the facts found in this case, the testator was not in fact a resident of Cambridge at the time of his death. The question whether he was such a resident was before the assessors of Cambridge acting as public officers. If he was such a resident, then it was their duty to tax him, otherwise not. That question was to be decided by them in the first instance, and neither the jurisdiction of the Probate Court nor the validity of any decree of the court was to be affected by their decision.

Suppose, for instance, that the testator was at the time of his death a resident of Worcester, and his estate taxable there, could it be held that the adjudication by the Probate Court of Middlesex County that he was a resident of Cambridge was conclusive upon the assessors of Worcester? To so hold would stretch the statute far beyond its plain reading, for it would make the adjudication of the court as to the residence of the person conclusive not only for the purpose of its own jurisdiction, but upon any other tribunal acting independently of the court.

To confine the legal force and effect of the adjudication of the Probate Court as to the residence of the person to its effect upon its own jurisdiction to settle the estate is to keep within the plain reading of the statute, and is in accordance with the purpose for which it was enacted.

Nor is there any estoppel of record. Neither the assessors of Cambridge nor the plaintiff were parties to the proceedings in

Digitized by Google

the Probate Court. There is no mutuality. *Braintree* v. *Hingham*, 17 Mass. 432. *Brigham* v. *Fayerweather*, 140 Mass. 411.

There was no estoppel *in pais*. There is no evidence that the defendants made whatever statements they did make with the intent that the city should rely upon them, nor that the assessors did rely upon them. *Tracy* v. *Lincoln*, 145 Mass. 357. *Stiff* v. *Ashton*, 155 Mass. 130. *Lincoln* v. *Gay*, 164 Mass. 537. *Traders' National Bank* v. *Rogers*, 167 Mass. 315. *Shepard & Morse Lumber Co.* v. *Eldridge*, 171 Mass. 516.

Upon the terms of the report there must be

*Judgment on the finding.*

---

ANDREW L. POLLOCK & others *vs.* JAMES G. MORRISON.

Middlesex. January 16, 1900. — May 16, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Lien on Buildings and Land — Inaccuracy of Description in Statement and Petition — Amendment of Petition — Evidence of Intention.*

The grantee of two adjoining lots of land, who, after the purchase of the second lot, builds a permanent fence westerly of the division line between them, extends a portion of a building on the first lot upon the second lot east of the fence, concretes the space between that building and the fence, and subsequently erects a building on the second lot west of the fence, may testify at the trial of a petition to enforce a lien against the second lot which describes the lot as it was described in the deed to him, that it was his intention by the erection of the fence to establish a new permanent division line between the lots.

A petition to enforce a lien on buildings and land should be dismissed if the land is described therein in the language of the deed conveying it to the respondent and not according to different and permanent bounds established by the respondent after the conveyance; but the Superior Court may allow the petition to be so amended as to describe the land correctly and the lien to be thereupon established.

If an inaccuracy in the description of land in a petition to enforce a lien against buildings and land is amended, a similar inaccuracy in the statement filed in the registry of deeds, which cannot be amended, will be considered as within the provisions of Pub. Sts. c. 191, § 8, and not fatal.

FIVE PETITIONS, to enforce liens upon buildings and land in Somerville under Pub. Sts. c. 191. The petitions, which followed the language of the description in the deed by which the land

Digitized by Google

was conveyed to the respondent in 1896, described it as lot No. 7 on a certain plan bounded "northeasterly on Pearl Street forty (40) feet, southeasterly on lot No. 6 on said plan 70 feet, southwesterly on lots 8 and 9 on said plan 40 feet, northwesterly on lot No. 8 on said plan 70 feet, containing 2,800 square feet."

Trial in the Superior Court without a jury, before *Hopkins*, J., who found for the petitioners; and the respondent alleged exceptions. The location of the land and buildings is shown upon the accompanying plan, and the material facts appear in the opinion.

*E. R. Thayer*, for the respondent.

*A. J. Daly*, for the petitioners.

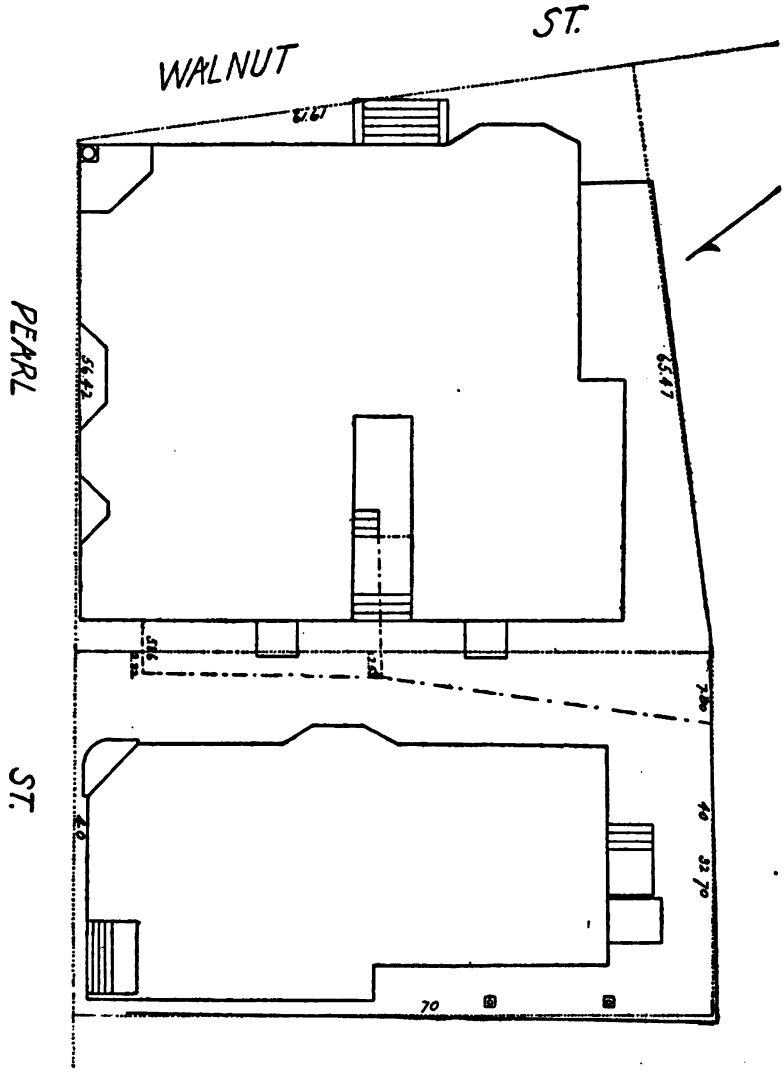
HAMMOND, J. It appeared at the trial that, in 1894, the respondent bought a lot of land on the southwesterly corner of Pearl and Walnut Streets, in Somerville, and thereafter proceeded to build thereon a block of buildings; that in the construction of the block he found the lot too small for it as planned; that during its construction he purchased a lot adjoining on the west, being the land described in this petition; and that immediately after the purchase of this second lot he put up a fence some feet westerly of the old division line between the two lots, said fence running from the southerly line of the second lot in a direction nearly parallel with the old division line, to a point distant about fifteen feet southerly from the southerly line of Pearl Street, and then turning at right angles and running easterly about six feet, crossing the said division line to the rear of the block, all as shown on the plan annexed to the bill of exceptions. It further appeared that he concreted the entire space between the block and the fence, and that portions of the block extended upon a part of the second lot easterly of the fence.

The building upon which the petitioners worked was wholly upon that part of the second lot which was west of the fence, and there was evidence tending to show that it was not begun until December, 1897, or later, long after the fence was built. The respondent contended, and offered to show, that his intention was "to make a permanent division by said fence, and to divide the entire tract owned by the respondent into two lots divided by said fence." As bearing upon this, he was asked in direct examination what his intention was with refer-

Digitized by Google

ence to the division of land in putting up the fence and doing the concreting. The court excluded the question.

Inasmuch as the lien could be maintained upon no other lot of land than that upon which the building was situated, *Landers* v. *Dexter*, 106 Mass. 531, and must be maintained, if at all, upon the whole of such lot and not a part thereof, *Whalen* v. *Collins*, 164 Mass. 146, the boundaries of the lot were of course material.




Digitized by Google

In this case it was not claimed by the petitioners that the entire tract of land upon which the two buildings stood was one lot. If that was so, then the petition must have been dismissed. *Whalen* v. *Collins*, *ubi supra*. It was a part of their case that there was some division of the land, and the question at the trial was, whether that division was fixed by the deeds by which the property was conveyed to the respondent, or by the subsequent acts of the respondent. It was the right of the owner to divide the land as he saw fit. Upon the corner lot he had built a block of buildings, some portions of which extended over upon the second lot. He had built a fence permanent in form, and had concreted the land between the block and the fence. It is true that the fence did not extend to the line of Pearl Street, but it came near enough to it to separate substantially the lots. The changes were plainly to be seen, and obviously contemplated a separate use of the two lots as divided by the fence; and we think that in order to meet any claim that the fence was erected for another or merely temporary purpose, the respondent had the right to show that it was intended as a permanent and complete separation of the lots. Evidence of his intention being material, he was a competent witness in that behalf. *Snow* v. *Paine*, 114 Mass. 520. *Stevens* v. *Stevens*, 150 Mass. 557.

We think, therefore, that the evidence should have been admitted. But it does not necessarily follow that there should be a new trial. On all other questions the court below found in favor of the petitioners. The Superior Court has the power, if it sees fit, upon proper terms, to allow the petitions to be amended so that the easterly boundary of the land described therein may be the line of the fence, so far as it goes upon the lot. Should such an amendment be allowed, then the finding of the court establishing the liens can stand as to the building and land described in the amended petitions.

While it is true that the statements filed in the registry of deeds cannot be amended, still we think the inaccuracy therein as to description comes within the provision of Pub. Sts. c. 191, § 8, and that such inaccuracy is not fatal.

The petitioners should have an opportunity to apply to the Superior Court for leave to amend their petitions in the manner above stated. Whether such an amendment should be allowed,

Digitized by Google

and on what terms, it is for that court to decide. Should such an amendment be allowed, then the exceptions are overruled; otherwise, they are sustained. *So ordered.*

---

GEORGE W. ANDERSON *vs.* JACOB D. ALBERTSTAMM.

Suffolk. January 17, 1900. — May 16, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Expert Testimony — Hypothetical Questions — Exercise of Discretion by Presiding Justice.*

Where expert testimony is offered by way of answers to hypothetical questions, much must be left to the discretion of the presiding justice. The jury are instructed to disregard the answers unless they find the facts as assumed in the questions; but as it cannot be known in advance what may be the ultimate decision of the jury as to the facts in dispute, the usual practice is to allow counsel in framing a hypothetical question to assume the existence of such facts and conditions as the jury may have a right to find upon the evidence as it then is, or as there may be fair reason to suppose it may thereafter appear to be; and in determining whether a hypothetical question shall be allowed, the judge in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be; and the evidence in this case as to the services rendered by the plaintiff as an attorney at law, compared with the facts assumed in the hypothetical questions to which exceptions were taken, shows no ground of exception.

In this case, which was an action to recover for professional services rendered the defendant in a suit in equity, it sufficiently appears that the question put to an expert witness assumed that he knew what was stated in the bill.

CONTRACT, to recover $300, alleged to be due the plaintiff, an attorney at law, for professional services. At the trial in the Superior Court, before *Hopkins*, J., the plaintiff testified that he had been engaged in general practice for more than nine years; that his office expenses were $150 per month; that on Saturday, October 15, 1898, the defendant, whom the plaintiff had not previously known, came to the plaintiff's office in company with a young lawyer named Samuel Fine, who had been a student in the law school when the plaintiff was an instructor in equity there; that Fine introduced the defendant, and together they told the plaintiff that the defendant owned the

Digitized by Google

Hotel Klondike in Boston; that it was worth $150,000, was assessed for $83,000, was subject to a first mortgage of $55,000, to a second mortgage of $16,000, neither of which was due; that the defendant had put $10,000 to $15,000 into the hotel; that the liquor license had been taken away before he purchased it; that foreclosure proceedings had been commenced by the second mortgagees on account of the default in the payment of the interest and taxes, and that the foreclosure sale was set for Monday, October 17, at twelve o'clock; that the defendant wanted time; that he had been negotiating with a man named O'Connor, with whom he had made an oral agreement to lease the hotel; that O'Connor had applied to have his license transferred, and had agreed to sign a lease on September 24, but had disappeared; that the defendant had obtained evidence that representatives of the second mortgagees had got O'Connor out of the way by representing to him that they were going to foreclose and would then let him the property on better terms; that Mr. Fine showed him a bill in equity all ready for filing, which the plaintiff produced, brought by Albertstamm, as plaintiff, against Hager and another, which the plaintiff examined; that the plaintiff told them that the strongest point they had in their claim was the alleged interference of Hager, the agent of the parties really in interest for coming between this proposed agreement of O'Connor and Albertstamm, and preventing him from letting the premises, etc.; and the plaintiff redrew the bill drawn by Fine, dictating the same to his stenographer, who wrote it out. He further testified that he then went to the court-house to arrange for a hearing upon an ex parte application for a temporary injunction; that after some difficulty he secured a temporary injunction; that he had a conference with Mr. Gaston over the telephone the day the injunction was issued, and another conference the following Monday; that on October 20 he had a conference with the attorney for the defence, and a hearing before the court upon a motion to dissolve the injunction; that he spent substantially the whole of that forenoon upon the case; that within the next few days the answers were filed; that he had conferences with the defendant and Fine on October 22, 25, and 26, and also conferred with Mr. Gaston and other attorneys and parties; that on October 27 the case came

Digitized by Google

up for a hearing, and the plaintiff moved for a continuance and got it; that the plaintiff went all over the case with experts and got their opinions as to the value of the property, etc., and spent substantially all of October 27 in court and with the witnesses preparing the case; that on October 28 the defendant was in the plaintiff's office twice; that on October 31 the case came up for trial at 2 P. M. and was on trial until 4 P. M.; that on November 1, at 2 P. M., the trial was resumed and was finished at 4 P. M.; that the next day the court ordered that the plaintiff, on or before November 16, pay the taxes and costs, thus giving Albertstamm two weeks further time in which to raise the money; that that ended the trial of the case for some days; that it was in court for part of two or else part of three days; that on November 3 the plaintiff had another conference with the defendant, other conferences November 5, 7, 8, 9, 12, and 16; that the plaintiff conferred with other people each of these days in regard to the same matter; and that he paid the entry fee and sheriffs' bill, and sent the defendant a bill of $300 for the whole amount.

Mr. Charles T. Gallagher, called as a witness for the plaintiff and qualified as an expert, testified as follows, subject to the defendant's exception:

"*Q.* Did you at my request examine the bill in equity of Albertstamm against Hager and others? *A.* Yes.

"*Q.* So you have a general idea of the facts as stated in that bill? *A.* Yes.

"*Q.* And the claim as stated in that bill. Now I will put a single question to you, Mr. Gallagher? What would you say was a fair price, a fair charge, by a member of the bar, for drafting and bringing a bill in equity setting forth those facts for the purpose of preserving an equity of redemption of $75,000 and securing time for the carrying out of negotiations for a lease involving an annual rental of a foreclosure of this apparent equity of $75,000, securing a month's time by litigation in the equity court for the purposes of carrying out those business transactions, involving some legal services on each of at least twenty days, including between five and six different days' hearing in the equity court, two or three whole days, and, say, some legal services for twenty-two days?"

Digitized by Google

The witness. "You mention nothing there of cash expenditures.

"*Q.* Supposing those were nine dollars? *A.* Not less than $300, and from that to $500, I should say. The class of action in the first place would be one that such as almost any lawyer at this bar would go to a man of twenty or thirty years' experience, like Mr. Robert M. Morse or Mr. Bartlett, or men of that standing, who would not let you out of their office for less than a $500 retainer. You go from that down to the inexperienced youth that could not do it anyway. Something from $300 to $500, you would get your figure."

The defendant objected on the ground that the question did not state the facts; but the court ruled the testimony admissible, and the defendant duly excepted.

Mr. Thomas W. Proctor, called as a witness for the plaintiff, and duly qualified as an expert, testified, subject to the defendant's objection and exception.

"*Q.* You have examined this bill referred to? *A.* Yes; the substance of it was stated by Brother Anderson to me. I have not had much of an opportunity to examine the bill myself.

"*Q.* But from what general knowledge you have of it and what is stated in it, what would you say a fair price was for an attorney's services in drafting that bill, involving the amount of property and the interest referred to in it, and getting from the equity court an injunction and securing a month's time for the client within which to carry out the deals about it, in the claim of that bill, involving two or three whole days' trial in the equity session and five or six partial days, and including some part of legal services in connection with the preparation of this case for parts of twenty days; what should you say a fair price and charge was for that service?"

To the admission of the foregoing testimony the defendant objected; the judge admitted the testimony, and the defendant duly excepted. "*A.* I should think $500."

"*Q.* And what would you say, Mr. Proctor, was a fair charge per day for the trial of a cause in the equity court involving in general the interests referred to in that bill? *A.* I should think for a man of Mr. Anderson's position at the bar and his

Digitized by Google

abilities, which are recognized by everybody, I think Mr. Anderson is entitled to $100 a day for a case of any importance.

"*Q.* You would include this? *A.* Yes."

The defendant testified as a witness in his own behalf to certain facts and conversations which were claimed by his counsel as tending to show that he did not employ the plaintiff, but that the defendant employed Mr. Fine and Mr. Fine employed the plaintiff.

The defendant's attorney asked of the defendant:

"*Q.* Did you know when Mr. Anderson was acting in this case that he looked to you for his compensation, for his pay?"

To the admission of this evidence the plaintiff objected, the court ruling the testimony inadmissible, and excluded it; and the defendant duly excepted.

Samuel Fine was called by the defendant as a witness, but did not testify that he employed the plaintiff, and he was not asked by the defendant's attorney if he did so employ him, and gave no evidence tending to contradict the plaintiff's testimony as to employment.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*C. W. Rowley*, for the defendant.

*A. L. Spring*, for the plaintiff.

HAMMOND, J. The defendant objects to the hypothetical questions put to the experts upon the ground that the hypothesis in each was not in accordance with any view of the facts which the jury could properly take of the evidence, and therefore the questions should not have been allowed.

Where expert testimony is offered by way of answers to hypothetical questions, much must be left to the discretion of the presiding justice. The jury are instructed to disregard the answers unless they find the facts as assumed in the questions; but as it cannot be known in advance what may be the ultimate decision of the jury as to the facts in dispute, the usual practice is to allow counsel in framing a hypothetical question to assume the existence of such facts and conditions as the jury may have a right to find upon the evidence as it then is, or as there may be fair reason to suppose it may thereafter appear to be; and in

Digitized by Google

determining whether a hypothetical question shall be allowed, the judge in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be.

We have examined the evidence in this case as to the services rendered by the plaintiff, and have compared it with the facts assumed in the hypothetical questions to which exceptions were taken, and we see no ground for exception. We think also that it sufficiently appears that the question to Mr. Proctor assumed that he knew what was stated in the bill.

The exception to the exclusion of the question to the defendant as to whether he knew that the plaintiff while acting in the former case was looking to him for pay, is not argued by the defendant, nor is it included in the statement at the head of the defendant's brief of the questions raised by the bill of exceptions. We therefore regard it as waived.

*Exceptions overruled.*

---

ANNIE ANDREWS, administratrix, *vs.* KATE H. ANDREWS.

Suffolk. January 23, 1900. — May 16, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Validity of Divorce obtained in another State — Foreign Laws — Estoppel.*

The statute of South Dakota requiring a libellant to reside in the Territory for ninety days before beginning proceedings for divorce requires domicil and not merely bodily presence. *Quære*, what would be the effect in other States of a decree under a statute substituting bodily presence for domicil.

A South Dakota decree of divorce may be held void under Pub. Sts. c. 146, § 41, in a collateral proceeding in this State, upon a finding here that the parties were not domiciled in South Dakota, although the court granting the divorce found the other way and the libellee had appeared. The libellee in the divorce proceedings had withdrawn and the finding was on ex parte evidence.

A libellee in divorce who withdraws her appearance for money is not estopped subsequently to deny the validity of the divorce as against a second wife in collateral proceedings.

APPEAL from a decree of the Probate Court appointing Annie Andrews administratrix of the estate of Charles S. Andrews.

Digitized by Google

Trial before *Hammond*, J., who ruled that the divorce obtained in South Dakota was, by Pub. Sts. c. 146, § 41, of no force or effect in this Commonwealth; that Kate H. Andrews, the appellant, was the lawful wife; that the second marriage was illegal, and ordered the decree of the Probate Court to be reversed and the case remanded to that court; and Annie Andrews alleged exceptions. The facts appear in the opinion.

*J. Fox & E. R. Anderson*, (*C. W. Bartlett* with them,) for the appellee.

*A. Hemenway & F. D. Allen*, for the appellant.

HOLMES, C. J. This is an appeal from the decree of the Probate Court appointing Annie Andrews administratrix of the estate of Charles S. Andrews. The appellant is the first wife of the deceased. The appellee married him later in good faith, after he had obtained a decree of divorce in South Dakota. The questions are whether the divorce is valid in this State, or whether, if it is invalid, the appellant, on the ground of connivance and acquiescence, is estopped to deny its validity. Charles S. Andrews went to South Dakota for the purpose of getting the divorce, and intended to return to Massachusetts as soon as he had done so. Subject to this intention it is found that he intended to become a resident of South Dakota for the purpose of getting a divorce, and to do all that was needful to make him such a resident. The statute of South Dakota forbids a divorce "unless the plaintiff has, in good faith, been a resident of the Territory ninety days next preceding the commencement of the action." Compiled Laws of Territory of Dakota, § 2578. St. South Dakota, 1890, c. 105, § 1. Andrews lived in South Dakota ninety days; and the Dakota court found in favor of its own jurisdiction, substantially in the words of the section just quoted, and granted the divorce for a cause which would not authorize a divorce by the laws of this Commonwealth.

The consensus of English speaking courts founds jurisdiction of divorce on domicil. It may be that a State might substitute for domicil, by statute, if it chose, simple bodily presence within its borders for a certain number of days. It may be, at least under the Constitution of the United States, that a divorce granted under such a statute between parties, both of whom were before the court, would be entitled to respect here, not-

Digitized by Google

withstanding Pub. Sts. c. 146, § 41. But compare *People* v. *Dawell*, 25 Mich. 247, 264; *Dolphin* v. *Robins*, 7 H. L. Cas. 390, 414. But no such question arises in this case, because the language of the South Dakota statute must be taken to require not merely bodily presence, but domicil. In the light of the decisions upon similar acts, and the generally accepted rule making domicil the foundation, the words "resident of the Territory" mean domiciled in the Territory, whether they also mean personally present or not. *Graham* v. *Graham*, 81 N. W. Rep. 44. *Dickinson* v. *Dickinson*, 167 Mass. 474, 475. *Reed* v. *Reed*, 52 Mich. 117, 122. *Leith* v. *Leith*, 39 N. H. 20, 41. *Van Fossen* v. *State*, 37 Ohio St. 317, 319.

The finding of the single justice clearly means that the deceased did not get a domicil in South Dakota. He meant to stay there ninety days, and such further time, perhaps, as was necessary to get his divorce, and then he meant to come back to Massachusetts. It is true that he meant to do all that was needful to get a divorce, but he meant it because he was mistaken as to what was needful. In other words, he only meant to do what he supposed to be needful, and that was not enough. Whether if he had known what was needful he would have meant that and would have done it, is a speculation. In fact he did not mean or do it, on the facts so far stated. It is clear that the finding of the South Dakota court in favor of its own jurisdiction upon an ex parte hearing would not be conclusive, but that the facts would be open to examination here. *Adams* v. *Adams*, 154 Mass. 290, 294, and cases cited. *Hanover* v. *Turner*, 14 Mass. 227, 230, 231. *Thompson* v. *Whitman*, 18 Wall. 457. *Hoffman* v. *Hoffman*, 46 N. Y. 30. *Gregory* v. *Gregory*, 78 Maine, 187. *Watkins* v. *Watkins*, 125 Ind. 168.

But the appellant appeared in the divorce suit and denied the alleged residence of the deceased, although afterwards, upon receiving a certain sum of money, she directed her counsel to withdraw. There is a plain difference between a case in which a respondent has not submitted herself to the power of the court and one in which she has done so. In the former, a foreign State within whose territory she is domiciled may decline to allow her rights to be affected by the decree, whatever the record may allege. In the latter, there is stronger ground

Digitized by Google

for saying that if the libel alleges residence and any other facts necessary to give jurisdiction, the libellee no more can dispute the validity of the decree on the ground that the court was mistaken as to residence than she could upon the ground that it went wrong on the merits. Notwithstanding the language of some decisions which do not distinguish in terms between judgments where there has been no service and those where there has been an appearance, *Sewall* v. *Sewall*, 122 Mass. 156, 161, the decisions in some States where the question has been raised is in favor of the distinction. *Kinnier* v. *Kinnier*, 45 N. Y. 535, 540, 541. *Cross* v. *Cross*, 108 N. Y. 628, 630. *Fairchild* v. *Fairchild*, 8 Dick. 678. *Waldo* v. *Waldo*, 52 Mich. 94, 99. *In re Ellis' estate*, 55 Minn. 401, 411. Vanfleet, Collateral Attack, § 648, § 889, p. 877. See *Loud* v. *Loud*, 129 Mass. 14, 18; *Thompson* v. *Whitman*, 18 Wall. 457; Bigelow, Estoppel, (5th ed.) 296.

Supposing the State decisions just mentioned to be correct as to the effect of the decree between the parties, the general consequence would be that it was effective as to the rest of the world. As a general rule it would be inconvenient to admit that parties who were divorced as between themselves were not divorced as against others. *Kinnier* v. *Kinnier*, and *Waldo* v. *Waldo*, *ubi supra*. *Adams* v. *Adams*, 154 Mass. 290, 295. But a further distinction is taken. The world at large has no interest in the divorce, and therefore may be bound by it; but it is suggested that the State of the domicil has an interest, and that it cannot be concluded by a mere false recital in the record, because the foreign court did not even pretend to jurisdiction over that State. *People* v. *Dawell*, 25 Mich. 247, 257. In *People* v. *Dawell*, this proposition was applied in favor of the State of the domicil as a prosecutor, and at an earlier date it was applied by this court in favor of the State as a legislator. *Chase* v. *Chase*, 6 Gray, 157, 161.

It will be borne in mind that, on the facts before us, the case is not one in which the Legislature of South Dakota has undertaken to allow the grant of a divorce. It is one in which the court of that State has been deceived, and in which it would have refused to act and would have had no right to act, had it known the facts. In such a case as this, the State of the domicil, if it

Digitized by Google

sees fit, may decline to be bound by recitals in a record to which it is not a party. It may say, as Massachusetts has said by Pub. Sts. c. 146, § 41, that it will be governed by the fact, not by a possibly collusive record, and therefore that the fact must be ascertained, tried, and found here. Whether or not the statute goes farther than the law would go without it, we are of opinion, in accordance with the decision in *Chase* v. *Chase*, that as applied to this case it does not go beyond the constitutional powers of the State. In *Hardy* v. *Smith*, 136 Mass. 328, 331, it would seem from the papers in the case that there was an appearance for the respondent in the Utah court. The validity of the statute has been affirmed in a general way, more than once, (*Sewall* v. *Sewall*, 122 Mass. 156, 161. *Smith* v. *Smith*, 13 Gray, 209. *Dickinson* v. *Dickinson*, 167 Mass. 474,) and confined, as it should be, to persons retaining their Massachusetts domicil, (*Clark* v. *Clark*, 8 Cush. 385, 387,) it seems to be mainly declaratory of the law, (*Lyon* v. *Lyon*, 2 Gray, 367, 368,) unless in cases like the present, where, perhaps, apart from it, the parties both having appeared could not dispute the foreign adjudication of jurisdiction disclosed by the record. A further question might arise, as we have suggested, if the State granting the divorce had established a test of jurisdiction other than domicil; but that has not happened, and is not likely to happen.

The Commonwealth having intervened by legislation, the appellant gets the benefit of it irrespective of any merits of her own. The possibility of a distinction such as was sanctioned by *In re Ellis' estate*, 55 Minn. 401, upholding the divorce as between the parties and so far as concerns property rights, but treating it as void as against the State and for the purposes of the criminal law, is done away with by the act. It is settled that in a case within the statute the divorce is to be treated here as void for all purposes. *Chase* v. *Chase*, 6 Gray, 157, 160. It is settled that there is no estoppel even as against the party instituting the foreign proceedings. *Smith* v. *Smith*, 13 Gray, 209, 210. If the appellant's conduct amounted to connivance, as found, so that she could not have maintained a libel for adultery on the ground of the second marriage, that does not go far enough to constitute an estoppel. *Loud* v. *Loud*, 129

Digitized by Google

Mass. 14, 19. All that she did was to withdraw her active opposition to the divorce, in consideration of a payment of money, and thereafter to remain silent. We are compelled to overrule the exceptions. *Exceptions overruled.*

---

CHARLES B. DANA & others *vs.* CITY OF BOSTON.

Suffolk. March 6, 1900. — May 16, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Assessment of Land Damages — Evidence — Plan.*

At the trial of a petition for the assessment of damages to land from a change of grade of an adjacent public way, made under an order passed by the board of aldermen of the city of Boston in 1884, the petitioner was properly allowed to introduce in evidence the St. 1894, c. 439, by which the respondent was directed to lay out certain ways in a territory including the petitioner's land in accordance with a certain plan prepared in 1894, and also the plan referred to in the statute, for the purpose of aiding the jury in understanding the evidence introduced when they viewed the land, and of showing the changes made after the date of the order, and of presenting a desirable scheme for the use and improvement of the petitioner's land.

At the trial of a petition for the assessment of damages to land from a change of grade of an adjacent public way, made under an order passed by the board of aldermen of the city of Boston in 1884, the judge properly excluded evidence offered by the respondent that the petitioner, in accordance with an order of the board of health of Boston, acting under St. 1893, c. 342, had filled the land to a grade much below the grade to which he would have been obliged to fill in order to use his land had not the grade of the way been raised.

At the trial of a petition for the assessment of damages to land of the petitioner from a change of grade of an adjacent public way, made under an order passed by the board of aldermen of the city of Boston in 1884, the judge properly refused to rule as requested by the respondent, that if any ways in the vicinity of the petitioner's land were laid out by the respondent under St. 1894, c. 439, the value of the land taken therefor, and any damages caused to the remaining land of the petitioner by the laying out of such ways at the grades at which they were laid out, could then be recovered by the owner of the land.

PETITION, under Pub. Sts. c. 49, §§ 68, 69, for the assessment of damages to lands of the petitioners from a change of grade in Brookline Avenue, a public way in the city of Boston, made under an order of the board of aldermen, passed on September 16, 1884.



Digitized by Google

After the former decision, reported 170 Mass. 593, the case was tried in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

After the jury had viewed the land the petitioners introduced in evidence, subject to the exception of the respondent, the St. 1894, c. 439, providing that public ways in a certain territory, which included the land of the petitioners, should be laid out and constructed in accordance with a plan marked "Back Bay Lands, Pierre Humbert, Jr., City Surveyor, April 10, 1894," and also introduced in evidence, subject to like exception, the plan itself, with testimony that such ways had been laid out at certain grades under that plan, and that it was a very good plan for locating streets through the petitioners' land.

The respondent offered in evidence the St. 1893, c. 342, by which the board of health of the city of Boston was authorized, if the public health so required, to order any land in that city not bordering immediately on tide water to be filled to the grade of eleven feet above mean low water, and offered to prove that, in obedience to an order of the board of health acting under that statute, the land of the petitioners had been filled to grade eleven, which was six grades below the grade of Brookline Avenue before it was raised. The judge excluded the evidence, and the respondent excepted.

The respondent requested the judge to instruct the jury that if any ways were laid out by it under the St. 1894, c. 439, the value of the land taken therefor, and any damages occasioned to the remaining land of the petitioners by the laying out of such ways at the grades at which they were laid out, could then be recovered by the owners of the land.

The judge declined so to rule, and gave instructions to the jury, to which no exception was taken.

The jury returned a verdict for the petitioners; and the respondent alleged exceptions.

*T. M. Babson*, for the respondent.

*R. M. Morse*, (*N. U. Walker* with him,) for the petitioners.

KNOWLTON, J. This is a petition for the assessment of damages to the lands of the petitioners from a change of grade in Brookline Avenue, at and near the place where it crosses the Boston and Albany railroad. The order under which the

Digitized by Google

change was made was passed on September 16, 1884, and the damages are to be assessed as of that date. The petitioners were allowed to put in evidence the St. 1894, c. 439, and the Pierre Humbert, Jr. plan referred to in that statute, and the respondent excepted. It is clear that the statute and plan were not competent for the purpose of showing how the rights of the parties were affected by acts of the public authorities subsequent to the order changing the grade of Brookline Avenue. But with the consent of both parties, as we suppose, the jury took a view of the premises, and saw, among other things, conditions and changes which arose under this subsequent act of the Legislature. It was permissible to aid the jury in understanding the evidence introduced in their view, by showing what changes had been made after the date of the original order, and how they were made. Moreover, the evidence was competent as presenting to the jury a scheme for the development of the property, which was said by some of the witnesses to be a proper and desirable plan for the use and improvement of the petitioners' land. In determining the damages it was proper for the jury to consider feasible methods of using the property in order to see how it would be affected by the change of grade in the use to which it would be likely to be put. *Dickenson* v. *Fitchburg*, 13 Gray, 546, 558. *Hartshorn* v. *Worcester*, 113 Mass. 111. *Marsden* v. *Cambridge*, 114 Mass. 490. *Stone* v. *Heath*, 135 Mass. 561. *Beale* v. *Boston*, 166 Mass. 53.

The judge might well exclude the evidence offered by the respondent, of the doings of the board of health under the act of 1893. There was no dispute between the parties that these doings had reference to conditions which were not in any way affected by the change of grade in the street. The filling, which the respondent offered to show that the board of health ordered, was only to a grade much below the grade at which the petitioners would have been obliged to fill in order to use their lands, if the grade of Brookline Avenue had not been raised.

The judge was not called upon to instruct the jury in regard to damages to be recovered for the laying out of streets according to the Humbert plan. *Sexton* v. *North Bridgewater*, 116 Mass. 200, 207. Such damages were not in issue in this case,

Digitized by Google

and there is nothing to show that the jury was asked to consider them. The damages which the petitioners sought to recover were for the effect of the change of grade upon the land, and particularly in reference to filling the land to make it conform to the higher grade of the street.

*Exceptions overruled.*

---

WALLACE N. WRIGHT *vs.* JULIA A. YOUNG.

Suffolk. March 7, 1900. — May 16, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Broker — Action — Services — Evidence.*

In an action to recover a commission for services as broker, evidence from which the jury may find that the plaintiff was employed to procure for the defendant a customer who would lend upon a note and certain real estate a certain sum, and that the plaintiff found a customer who was ready to make such a loan as the arrangement between the plaintiff and the defendant called for, and that the failure to consummate the proposed transaction was through the fault or neglect of the defendant, is sufficient to warrant a verdict for the plaintiff.

CONTRACT, to recover a commission for services as broker. At the trial in the Superior Court, before *Aiken*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*B. L. M. Tower*, (*E. O. Hiler* with him,) for the defendant.

*P. B. Runyan*, for the plaintiff.

KNOWLTON, J. This is an action of contract to recover a commission for services as broker rendered by the plaintiff to the defendant. There was evidence from which the jury might find that the plaintiff was employed to procure for the defendant a customer who would lend upon a note and certain real estate the sum of $10,000, and that the plaintiff found a customer who was ready to make such a loan as the arrangement between the plaintiff and the defendant called for, and that the failure to consummate the proposed transaction was through the fault or neglect of the defendant. It is unnecessary to consider the evidence in detail.

Digitized by Google

The exception that there was no evidence to warrant the submission to the jury of the question whether the defendant failed to furnish the information which was desired by the Beacon Trust Company in considering whether to make the loan should be overruled. The plaintiff testified that he and the defendant were referred by Mr. Gale, the president of the company, to "Mr. Poor, the attorney of the company, who said he must see the will. . . . According to her statement the property was willed to her." Mr. Poor testified, referring to the plaintiff and defendant, "they could not give me sufficient information so that I could say whether I would take the loan." Mr. Gale, the president, testified, "I assured her if her statements were true we would loan." There was evidence that the trust company required her personal note and that she refused to give it, and that she did not take measures to obtain the loan which was ready for her. *Exceptions overruled.*

---

## THOMAS PEGLER *vs.* INHABITANTS OF HYDE PARK.

Norfolk. March 7, 8, 1900. — May 16, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Eminent Domain — Evidence as to Value of Property taken — Set-off of Value of Petitioner's Occupation after Taking — Damages of Landlord and Tenant — Cancellation of Lease — Interest.*

Upon the trial of a petition for the assessment of damages for the taking for a public purpose of a leasehold estate in property used for greenhouses, evidence of the value of the plants, flowers, and potted soil of the petitioner on the premises, and of the amount of business done by him, is admissible only as bearing upon the question of the capacity of the real estate for use, the view of the premises taken by the jury not enabling them to see the property as it was at the time of taking, as the greenhouses had been taken down and a part of the land had been filled up.

On a petition for the assessment of damages for the taking of property for a public purpose, the respondent cannot set off against the petitioner's claim for damages the value of the petitioner's occupation of the property for a time after the taking.

If, in the case of the taking of an estate for a public purpose, the landlord is only paid his damages as reversioner, the lessee is entitled to receive compensation for the injury to his interest; and the cancellation of the lease is not to be con-

Digitized by Google

sidered in estimating his damages; and under the statute, which applies to the case, interest does not begin to run until the land is entered upon for the purpose of construction.

PETITION, to the Superior Court, for a jury to assess damages for the taking of a leasehold estate in property used for greenhouses. The lease was for the term of five years from November 1, 1896, and the taking was on May 7, 1897. The petitioner vacated the premises on March 31, 1898, by reason of the taking, and on April 1, 1898, made an agreement with the lessor whereby the lease was cancelled. At the trial in the Superior Court, before *Richardson*, J., the jury returned a verdict for the petitioner; and the respondent alleged exceptions, which appear in the opinion.

*J. E. Cotter & A. F. Clarke*, for the respondent.

*H. H. Smith*, for the petitioner.

KNOWLTON, J. The petitioner's leasehold estate in property used for greenhouses was taken under St. 1896, c. 257, and 1890, c. 428. Under § 5 of this last statute, as amended by St. 1891, c. 123, the damages are to be determined "in the same manner and under like rules of law as damages may be determined when occasioned by the taking of land for the locating and laying out of railroads and public ways, respectively, in such city or town." This land was taken for a way.

The evidence of the value of the plants, flowers, and potted soil of the petitioner on the premises, and of the amount of business done by him, was admitted only for a single purpose, and was carefully limited in the instructions to the jury. The jury were told that no damages could be allowed for the good will, or for injury to the business or to the plants or flowers, and that this evidence was admitted only as bearing upon the question of the capacity of the real estate for use. The view of the premises which the jury had taken did not enable them to see the property as it was at the time of the taking, for the greenhouses had been taken down and a part of the land had been filled up. We are of opinion that with this instruction no injustice was done to the respondent by the admission of the evidence. *Maynard* v. *Northampton*, 157 Mass. 218. *Teele* v. *Boston*, 165 Mass. 88, 92.

The judge rightly ruled that the respondent could not set off

Digitized by Google

against the petitioner's claim for damages the value of his occupation of the property for a time after the taking. This subject has been considered in different aspects in several cases, and it is unnecessary to discuss it. *Edmands* v. *Boston*, 108 Mass. 535. *Old Colony Railroad* v. *Miller*, 125 Mass. 1. *Imbescheid* v. *Old Colony Railroad*, 171 Mass. 209.

The cancellation of the petitioner's lease was not to be considered in estimating his damages. This is not a case in which the entire damages for the taking of the land are to be estimated at one time, as they would be if the owner of the reversion had not been paid. In such a case, if there had been an assignment of a lease to the landlord, or a cancellation of it with an assignment of the lessee's claim for damages, that fact would be material. *Dickenson* v. *Fitchburg*, 13 Gray, 546, 558. But in this case the landlord was only paid the damages to her own estate as reversioner, and the petitioner is entitled to receive compensation for the injury to his interest. His interest at the time of the taking was as lessee entitled to hold the whole property to the end of his term. When he entered into the agreement with the landlord to cancel the lease, his interest was in property, a part of which had been taken, so that the remainder was of little value for the use for which it was leased. In the arrangement which he made to give up the lease, the value of his interest in its damaged condition was the subject of the contract, and presumably the terms which he was able to make with the landlord were much less favorable than they would have been if the property had not been injured by the taking. He made no assignment of his claim for damages, and the only way in which he can obtain compensation for the loss of value in the unexpired term of his lease is in this proceeding.

In cases of this kind interest is allowed upon the damages ascertained from the time when they were payable, which ordinarily is the time of the taking. *Parks* v. *Boston*, 15 Pick. 198, 208. *Imbescheid* v. *Old Colony Railroad*, 171 Mass. 209. By the Pub. Sts. c. 49, § 14, when land is taken for a public way, damages cannot be ordered paid, and a person claiming damages has no right to demand them, until the land is entered upon and possession taken for the purpose of constructing the way. Under this statute, which applies to the present

Digitized by Google

case, the interest does not begin to run until the land is entered upon for the purpose of construction. *Edmands* v. *Boston*, 108 Mass. 535, 551.

It was agreed that if the court should hold the ruling of the presiding judge in this particular to be erroneous, the verdict should be reduced in the sum of $51.48. The verdict is to be diminished by this sum in accordance with the agreement, and the entry will then be *Exceptions overruled.*

---

COMMONWEALTH *vs.* ISAAC H. GOLDSMITH.

Suffolk. March 12, 1900. — May 16, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Sale of Tobacco on the Lord's Day — Evidence.*

While a sale made in good faith upon an application for tobacco to be used as a medicine may be within the following language of St. 1895, c. 434, § 2, relating to the observance of the Lord's day, "but nothing in this statute shall be held to prohibit . . . the retail sale of drugs and medicines," yet, there being no offer to show such a sale, evidence that the defendant sold the articles as drugs is rightly excluded.

COMPLAINT, under § 2 of St. 1895, c. 434, relating to the observance of the Lord's day. At the trial in the Superior Court, before *Sheldon*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

*E. H. Pierce*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth, submitted the case on a brief.

KNOWLTON, J. This is a complaint against the defendant under St. 1895, c. 434, § 2, for doing business, namely, selling two cigars and an ounce of tobacco, on the Lord's day. The witness for the Commonwealth testified as follows: "I went in and told him I wanted two good cigars and a five-cent piece of tobacco, and that I should use them as evidence against him if I got a warrant; and he gave me the cigars and piece of tobacco." The witness paid twenty-five cents for them. The defendant offered to show that when the witness asked for the

Digitized by Google

cigars and tobacco the defendant said, "I will sell them to you as drugs," and that the witness, after he got them, said, "I propose to use them as evidence," and that the defendant then said, "I cannot help what you want them for, I sold them to you as drugs," and he offered to show by experts that tobacco and cigars are drugs. The defendant carried on a drug business and had a drug department in the store.

There is no doubt that selling cigars and tobacco is doing business within the prohibition of the statute, unless it is protected by the words, "but nothing in this statute shall be held to prohibit . . . the retail sale of drugs and medicines." In *Commonwealth* v. *Marzynski*, 149 Mass. 68, 72, it was held that cigars are not drugs within the meaning of this provision of the statute. Like many other things they may be medicinal; like many other things which are articles of commerce and are prepared for other than medicinal use, they contain an ingredient or element that in a broad sense may be called a drug; but as ordinarily prepared and sold they are not themselves drugs. It may be that with or without a prescription from a physician one may lawfully purchase tobacco or cigars as medicine at a drug store on the Lord's day. A sale made in good faith upon an application for tobacco to be used as a medicine may be within the above quoted language of the statute. In the present case there was no offer to show such a sale, but only that the defendant sold the articles as drugs. The evidence offered and excluded had no tendency to show that the sale was within the protection of the statute.

*Exceptions overruled.*

Digitized by Google

## TERESA M. GARGAN *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. December 13, 14, 1899. — May 17, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Personal Injuries — Car Fender not an Obstruction of Highway.*

The use of a street car with the rear fender projecting does not constitute an obstruction of the highway.

TORT, for personal injuries occasioned to the plaintiff by falling over a fender projecting from the rear of an electric car from which she had just alighted. At the trial in the Superior Court, before *Richardson*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*M. F. Dickinson, Jr. & W. B. Farr*, for the defendant.

*P. M. Keating*, for the plaintiff.

BARKER, J. The car upon which the plaintiff rode from Boston stopped about opposite her dwelling to allow passengers to leave. She left by the rear door. Her house was upon the right as she passed from the door. The gate upon that side was up, and she descended from the platform by the steps leading to the left, so that when she reached the street her back was toward her house. There was a cross walk, about seven feet wide, partly occupied by the rear end of the car, from which at the time a fender projected about two feet. Enough of the cross walk was left unoccupied for her passage to the sidewalk of the side of the street where her house was. The hour was about six o'clock of an evening in the middle of December. There were street lights, not very near, and the locality was quite dark, although several witnesses testified that the fender was visible to them.

Upon reaching the ground, the plaintiff at once turned, and began to walk towards the other side of the street upon the cross walk. In so doing she went so near the end of the car that she struck against the projecting fender, and fell. She

Digitized by Google

did not see the fender, and did not know that it projected beyond the end of the car. Both ends of street cars have fenders, but usually they are so adjusted that they project only from the front end. This fender had in some way become so disarranged that it projected from the rear end of the car without the knowledge of the defendant's servants who were in control of the car, and contrary to the intention of the defendant. It is admitted that when the plaintiff left the car she ceased to be a passenger of the defendant. See *Creamer* v. *West End Street Railway*, 156 Mass. 320; *Bigelow* v. *West End Street Railway*, 161 Mass. 393, 395. When she began to walk towards her house she was merely a traveller upon the highway. The respective rights and duties of the plaintiff and the defendant were not those of a passenger and a common carrier, but those of a pedestrian crossing a public street in which was a street railway track then occupied by a street car, and of a street railway corporation lawfully using the same street in its traffic. From the time when she left the car until she was hurt the car remained stationary. The condition of things which existed at the time when she reached the street and turned to walk home was in no way changed by the defendant, nor were her actions in the least controlled or influenced by it. It cannot be contended that the presence of the car in the street, or its stoppage to allow passengers to leave, was unlawful; nor is it claimed that the stoppage was too long, or that the plaintiff expected that the car would move on to allow her to cross the street. The only cause of the accident was the plaintiff's own act in walking against the fender, and the contention is that the presence of the fender projecting from the rear end of the car was such a negligent occupation of the highway by the defendant as to make it liable for the plaintiff's injury. That the collision was the plaintiff's own act distinguishes the case from the common one in which two bodies, each lawfully present in a highway, and each in motion, come into collision. Instances in which a traveller collides with or is injured by a stationary vehicle or other object lawfully placed in a highway by some other person or traveller are not very rare. One of our earlier cases declared the right of the owner of lands abutting on a highway to erect buildings and fences on the street line, and to place in

Digitized by Google

them doors and gates which would swing over the street when opened, to place temporarily building materials and earth from cellar excavations within the street, and to allow horses and carriages to stand occasionally in the street against or near a house. *O'Linda* v. *Lothrop*, 21 Pick. 292. In *Judd* v. *Fargo*, 107 Mass. 264, a sled with sap tubs upon it, left standing within the limits of the way, and outside of the travelled path, caused the plaintiff's injury by the frightening of his horse. It was held that the defendant had a right to have the sled and tubs remain in the highway for a reasonable time for the purpose of transferring them to his own premises, and that all that the law requires in such a case is that the obstruction shall not be continued for an unreasonable length of time. That the probability or improbability of the presence of such an obstruction was considered to be immaterial to the defendant's right so to leave his sled and tubs is to be inferred from the fact that in the same case the defendant was not allowed to show that other persons were accustomed to do the like; in other words, it seems that the test applied to decide the question of the defendant's liability was not whether the sled and tubs as left by him were likely to produce the accident, but whether he had the right to leave them as he did. Any vehicle stationary upon a highway over which travellers are passing and repassing may be an occasion of injury to them if they are brought into contact with it by their own motions. In such cases the test of the liability of the owner of the stationary vehicle to the traveller who walks against it is not the probability that the traveller will be hurt if he walks against the vehicle, but is whether its owner was within his right in having such a vehicle stationary upon the street.

In the present case the car was properly upon the street, and its stoppage was merely temporary, and for a proper purpose. It is not contended that the car remained stationary longer than was necessary. The fenders at each end of the car were not like a cutting instrument, or an apparatus so dangerous that it ought not to be transported upon a public way without unusual care for the safety of travellers, but were appurtenances of the car, with which the law required it to be equipped. St. 1895, c. 378. It is not contended that they

Digitized by Google

were unlawful, or that there was any statute or ordinance which prescribed whether the fenders should be in one position or another, or which forbade the defendant to propel in the street a car with a fender projecting beyond the end of the rear platform. That fenders do not usually so project bears upon the question of the plaintiff's care or negligence, but does not make it unlawful to propel in the street a car with a fender so projecting. Vehicles are frequently met with in the streets with appurtenances projecting as far from the rear end of the main portion of the vehicle as the fender projected in the present instance. So loads of iron rods or pipes, lumber, beams, and other like articles often project to much greater distances behind the vehicles upon which they are. It is not unusual to see two or three wagons, one attached behind the other, drawn through the streets by one team. Yet a traveller who walked into such an obstacle to his passage, supposing that, if he avoided collision with the body of the vehicle to which the team was attached, the way would be clear, would collide with an obstacle which was rightfully in place, and could not recover for his injury. Nor would it be different if the traveller walked against such an obstruction in the night time, not seeing the obstruction on account of the darkness, if the owner of the vehicle had complied with such requirements as to lights as were in force at the place where the collision occurred. The case does not show that there were any such requirements, or that, if there were, they were not complied with by the defendant. We know of no requirement anywhere that a street car or other vehicle used at night upon a highway shall be so lighted that every part of it shall be plainly visible to those who come upon it in the rear as well as in front. We think, therefore, that, irrespective of the question whether the plaintiff could be found to have been in the exercise of due care in walking against the fender, a verdict should have been ordered for the defendant, because, upon the undisputed evidence, the obstacle against which the plaintiff walked was part of a vehicle lawfully using the street within the defendant's right.

*Exceptions sustained.*

Digitized by Google

## JAMES H. DURGIN & another *vs.* FRANCES E. COLBURN & others.

Essex. January 10, 11, 1900. — May 17, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Limited Partnership — Liability as General Partners.*

If, in the case of a limited partnership, the certificate of renewal is made upon the theory that the continuation of the interest of the special partner in the assets of the expiring firm is a contribution to the capital of the new firm equal in amount to that originally contributed, and it appears that the capital has been substantially impaired by losses in business and no fresh capital is then contributed, the St. of 1887, c. 248, is not complied with, and all the members of the new firm are subject to the liabilities of general partners.

CONTRACT, to recover the balance due upon a promissory note for $3,000, signed by Colburn, Fuller, and Company. The defendant, Frances E. Colburn, set up in her answer that, as special partner in the firm composed of George D. Colburn, Edward L. Fuller, and herself, she was not liable for the note or any part thereof. Trial in the Superior Court without a jury, before *Fessenden*, J., who found for the plaintiffs in the sum of $459.65 with interest; and the defendant, Frances E. Colburn, alleged exceptions. The plaintiffs, being aggrieved by the judge's refusal to give certain rulings, also alleged exceptions. The facts appear in the opinion.

*B. N. Johnson*, for Frances E. Colburn.

*B. B. Jones*, for the plaintiffs.

BARKER, J. One of the questions raised is decisive of the case. Upon the others we express no opinion. When the partnership was renewed no contribution to its capital was made by the special partner, except that of continuing in the firm her interest in the assets of the expiring partnership. This interest was then substantially less in value than her original contribution of $100,000 to the capital of the expiring firm, owing to the impairment of its capital by losses in its business, and without taking into account the amount paid out as interest on the special capital. The certificate of renewal is to the

Digitized by Google

effect that the special partner had contributed the sum of $100,000 in cash to the original limited partnership, and that the sum so contributed is continued by her in the partnership as her contribution of capital upon the renewal. The defendants then believed that her interest in the partnership was of the value of $100,000, but the fact was otherwise, and the case contains no statement of any just ground for this belief.

Limited partnerships are creatures of the statutes. The present case is governed by St. 1887, c. 248, § 3, amending Pub. Sts. c. 75, § 7, by adding a new provision as to renewals.

Our first enactment as to limited partnerships, St. 1835, c. 48, required the actual cash payment of a specific sum, as capital, to the common stock by the special partner, and the making, acknowledgment, recording, and publication of a certificate, stating among other things "the amount of capital which each special partner has contributed to the common stock." St. 1835, c. 48, §§ 3, 4, 5. Upon every renewal a certificate thereof was to "be made and acknowledged, recorded and published," in the same manner provided for respecting the original formation of the partnership. St. 1835, c. 48, § 6. The provision made by the section last cited remained substantially unchanged until the enactment of St. 1887, c. 248, § 3. See Rev. Sts. c. 34, § 6; Gen. Sts. c. 55, § 6; Pub. Sts. c. 75, § 7. Up to that time it had never been considered in a case involving the obligations of a special partner in a renewed limited partnership, but had been mentioned merely in *Lancaster* v. *Choate*, 5 Allen, 530, 538.

The language of Pub. Sts. c. 75, § 7, was this: "Upon every renewal or continuation of a limited partnership beyond the time originally agreed upon for its termination, a certificate of such renewal or continuation shall be made, acknowledged, filed and published in like manner as herein provided for the certificate of its original formation." The statutes of Pennsylvania and of New York had a similar provision; to which was added a declaration that every such partnership otherwise renewed or continued should be deemed a general partnership. Penn. St. 1835–36, No. 51, § 11; 1 N. Y. Rev. Sts. 765, § 11. The language of these two provisions is identical, and is this: "Every renewal or continuance of such partnership beyond the time originally fixed for its duration, shall be certified, acknowledged and re-

Digitized by Google

corded, and an affidavit of a general partner be made and filed, and notice given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership." In the year 1885 this provision had been held in Pennsylvania to require that when a limited partnership was renewed the special capital must be unimpaired. *Haddock* v. *Grinnell Manuf. Co.* 109 Penn. St. 372, 382. On the other hand, in March, 1886, a special term of the Supreme Court of New York, by a decision afterward sustained in effect by the Court of Appeals, had held that the fact that the special capital had been wholly lost at the time of the renewal did not make the renewed firm a general partnership. *Ropes* v. *Colgate*, 17 Abb. (N. Y.) 136. *Fifth Avenue Bank* v. *Colgate*, 120 N. Y. 381. Whether or not these contradictory constructions of a statute substantially like our own, then contained in Pub. Sts. c. 75, § 7, were known to the Legislature of 1887 when it amended our statute we are not informed. However this may have been, the amendment then added can have but one meaning. In saying, by St. 1887, c. 248, § 3, "No such renewal or continuation shall be made unless the capital contributed by the special partners is equal in amount or more than the aggregate capital the special partners originally contributed," the Legislature, by the words "equal in amount," meant equal in value as a resource or asset of the partnership. This is the most natural signification of the language of the amendment, which never would have been used to show that the original section was intended to allow a limited partnership to be renewed with a special capital impaired or lost, and without a fresh contribution.

Money originally contributed as capital of a firm and then lost in its business is not thereafter capital of that firm, and cannot be contributed as capital of a renewed firm. If the only contribution then made to special capital is the interest of the special partner in the old firm, depreciated in amount by a substantial impairment due to losses in business, it cannot be equal in amount to the original contribution.

The present case is not one in which the persons who made the certificate of renewal had good ground for believing that there had been no impairment of the original capital, and we do

Digitized by Google

not decide that if at the expiration of a limited partnership, the partners believed with good reason that the whole capital was intact, and so agreed to and certified a renewal upon that basis, the mere fact that it thereafter turned out that there had been an impairment not then ascertained or ascertainable would make the renewal contrary to the statute.

Here the certificate of renewal was made upon the theory that the continuation of the interest of the special partner in the assets of the expiring firm was a contribution to the capital of the new firm equal in amount to that originally contributed. But because the capital had been substantially impaired by losses in business, and no fresh capital was then contributed, the statute was not complied with, and all the members of the new firm are subject to the liabilities of general partners. St. 1887, c. 248, § 4. *Judgment for the plaintiff on the finding.*

---

EUGENE McDONALD *vs.* HENRY GREEN & trustees.

Suffolk. January 11, 1900. — May 17, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Tort for Slander of Title — Trustee Process.*

An action of tort for slander of title cannot be commenced by trustee process.

TORT, begun by trustee process. The declaration alleged that the plaintiff was the owner of certain real estate in Boston; that on October 15, 1897, he executed and delivered to one Israel Nesson a mortgage of the real estate to secure the payment of $3,000, of which $500 was to be paid on demand, and $100 every three months thereafter until the full amount of principal should be paid, together with interest; that on April 8, 1898, Nesson assigned the mortgage to the defendant Green; that the plaintiff observed and complied with all the conditions of the mortgage, and kept and performed all the terms thereof; that notwithstanding this fact the defend-



Digitized by Google

ant Green falsely, maliciously, and without any justifiable cause began foreclosure proceedings under the mortgage, and to this end published in the Boston Evening Traveller a notice of the time and place of the foreclosure sale, falsely alleging that the same was for breach of the condition contained in the mortgage; and that in consequence of this unlawful act of the defendant Green the plaintiff was greatly injured in his property and was put to great expense and trouble in restraining the defendant Green from proceeding with the foreclosure, and lost a profitable exchange of the property which was in process of negotiation at the time the foreclosure proceedings were commenced.

The defendant Green moved to dismiss on the ground that the action had been improperly brought by trustee process, such action being forbidden by Pub. Sts. c. 183, § 1, and not being authorized by the common law. He also demurred to the declaration, assigning as ground therefor that the plaintiff had not set forth any right of action either at common law or under the statutes of the Commonwealth; and that he had not shown by his declaration that he had suffered any damage or injury for which he has a remedy either under the statutes of this Commonwealth or at common law.

The Superior Court overruled the motion to dismiss, sustained the demurrer, and ordered judgment for the defendant. The plaintiff and the defendant both appealed.

*T. F. McDonough*, for the plaintiff.

*S. H. Smith*, (*A. Boyden* with him,) for the defendant.

BARKER, J. 1. The defendant's motion to dismiss the action should have been allowed. The action is in tort, and the substantive wrong charged is that the defendant falsely and maliciously and without justifiable cause began to foreclose a mortgage which he held upon the plaintiff's land, there having been no breach of the terms or conditions of the mortgage, and published in a newspaper a notice of the foreclosure sale, falsely alleging that the sale was for breach of the condition of the mortgage, and that in consequence of this unlawful act the plaintiff was injured. The alleged maliciously made false statement as to the plaintiff's property was an actionable wrong if by reason of it the plaintiff sustained special damage. *Swan*

Digitized by Google

v. *Tappan*, 5 Cush. 104. *Gott* v. *Pulsifer*, 122 Mass. 235. We have no doubt that such an action is an action of tort for slander within the meaning of Pub. Sts. c. 183, § 1. There is no reason for limiting the words there used, "actions of tort . . . for slander either by writing or speaking," to actions for the writing or speaking of words defamatory of persons only. Our statute divides all personal actions into three classes: contract, tort, and replevin. Pub. Sts. c. 167, § 1. When actions for slander, or for publishing a libel, are treated of in the subsequent provisions of the same chapter, as in §§ 79, 80, those provisions are applicable to actions of the class commonly known as actions for slander of title, as to actions for defamation of persons. The provision of Pub. Sts. c. 183, § 1, forbidding actions of tort for slander to be commenced by trustee process, is in the same part of the statutes with Pub. Sts. c. 167, and includes all actions of tort in which the wrong complained of is the writing or speaking of words designed to injure the defendant in his property, as well as those defamatory of his person or reputation. All such actions are well known and well described as actions of tort for slander. See Odgers, Libel & Slander, (1st Am. ed.) 137–139.

2. As the action must be dismissed, we do not consider the question of pleading.

*Order overruling motion to dismiss reversed and motion to dismiss allowed.*

---

## GOODYEAR SHOE MACHINERY COMPANY *vs.* BOSTON TERMINAL COMPANY.

Suffolk. March 6, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Eminent Domain — Taking of Leasehold Estate — Lease to terminate at Election of Lessors or Successors — Covenant for Quiet Enjoyment.*

On a petition to recover damages for the taking of a leasehold estate by the Boston Terminal Company, it appeared that on January 5, 1897, the respondent, being already the owner by purchase of the reversion of the land in question, filed a

Digitized by Google

location under the authority of St. 1896, c. 516, purporting to take in fee (by the right of eminent domain) a tract of land including the premises, and that three days later, on January 8, it served a notice on the petitioner that, whereas the lease was terminable by the lessor upon such a taking, it elected to terminate it. The lease provided that "in case the premises, or any part thereof, shall be taken for any street or other public use, or by the action of the city or other authorities, . . . then this lease and the term demised shall terminate at the election of the lessors or those having their estate in the premises." *Held*, that the meaning of the lease was that the landlord could end the right of the tenant to share in the damages; that the taking was within the terms of the proviso; that it was not a breach of the covenant for quiet enjoyment; and that the fact that it was done through the landlord made no difference.

PETITION to the Superior Court, under St. 1896, c. 516, to recover damages for the taking of the leasehold estate of the petitioner. The respondent demurred to the petition on the ground that it did not show any legal right in the petitioner to recover damages of the respondent. The Superior Court sustained the demurrer; and the petitioner appealed. The facts appear in the opinion.

*S. Lincoln*, for the petitioner.

*W. Hudson*, for the respondent.

HOLMES, C. J. This is a petition to recover damages for the taking of a leasehold estate by the respondent. It comes here by appeal from a judgment for the respondent upon demurrer. Shortly stated, the facts are as follows. On January 5, 1897, the respondent, being already the owner by purchase of the reversion of the land in question, filed a location under the authority of St. 1896, c. 516, purporting to take in fee (by the right of eminent domain) a tract of land including the premises. Three days later, on January 8, it served a notice on the petitioner that whereas the lease was terminable by the lessor upon such a taking, it elected to terminate it. The lease provided that "in case the premises, or any part thereof, shall be taken for any street or other public use, or by the action of the city or other authorities, . . . then this lease and the term demised shall terminate at the election of the lessors or those having their estate in the premises."

We are of opinion that the judgment appealed from was right. Of course any valid taking of the whole premises would put an end to the lease, (*O'Brien* v. *Ball*, 119 Mass. 28,) and therefore the provision quoted must not be construed too liter-

Digitized by Google

ally in its application to the present case. The object is that which is pointed out in *Munigle* v. *Boston*, 3 Allen, 230, 232, and the meaning is that the landlord can terminate the right of the tenant to share in the damages. See further *Burbridge* v. *New Albany & Salem Railroad*, 9 Ind. 546. Probably if the clause had not dealt with the taking of a part as well as of the whole, and had referred only to a taking of the whole, it would have stipulated absolutely that the tenant's rights should end, without requiring an election by the landlord. The election is inserted with reference to a partial taking. In this case the election was sufficiently manifested by the notice.

Without inquiring too curiously whether the taking affected the respondent's title otherwise than by taking the lease and ending any possible unknown outstanding claims, we have no doubt that it was a taking within both the letter and the spirit of the proviso in the lease.

It is suggested that, however it might have been if the land had been taken by a third person, when the taking is by the landlord, the landlord is bound by the covenant for quiet enjoyment. But the sovereign power to take by eminent domain is not an encumbrance, and the exercise of the power is not a breach of any of the ordinary covenants. *Ellis* v. *Welch*, 6 Mass. 246, 250, 252. *Parks* v. *Boston*, 15 Pick. 198, 205. These cases, especially the earlier, advert, it is true, to the remedy of the tenant for such a taking; but the construction of the covenants is the same when by another term of the lease the tenant may be deprived of a remedy, as is implied clearly enough by Chief Justice Parsons and Chief Justice Shaw in the cases cited, and as has been stated often elsewhere. The construction is based upon the notion that such covenants go only to the lessor's title, and do not warrant against those fundamental liabilities to action on the part of the sovereign power which lie behind all private titles. *Frost* v. *Earnest*, 4 Whart. 86, 90. *Dobbins* v. *Brown*, 12 Penn. St. 75, 80. *Legal Tender Cases*, 12 Wall. 457, 549. Rawle, Covenants for Title, (5th ed.) §§ 129, 153. It follows that it cannot matter that the person who sets the delegated sovereign power in motion is the landlord. The exercise of that power has not been covenanted against. See *Kip* v. *New York & Harlem Railroad*,

Digitized by Google

67 N. Y. 227, 229. The same conclusion might be justified more shortly by saying that, as the respondent would have had the right it claims upon a taking by any one else, the law will keep the two characters of landlord and representative of the public power distinct, so far as necessary to preserve rights dependent upon its doing so. *Brimmer* v. *Boston*, 102 Mass. 19. *Brick Presbyterian Church* v. *New York*, 5 Cow. 538.

It is not disputed that the respondent succeeded to the original lessor's right to terminate the lease.

*Judgment for the respondent affirmed.*

---

GEORGE D. DANFORTH *vs.* GROTON WATER COMPANY.
VALE MILLS *vs.* SAME.

Middlesex. March 6, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Assessment of Damages — Application for Jury — County Commissioners — Statute — Motion to dismiss.*

One whose water rights are taken under St. 1897, c. 338, incorporating the Groton Water Company, cannot apply directly to the Superior Court for a jury without first making application to the county commissioners for an assessment of damages.

TWO PETITIONS to the Superior Court for a jury to assess damages for the taking of certain alleged water rights by the respondent corporation. The respondent moved to dismiss the petitions for want of jurisdiction in that it did not appear that an application had been made, in the first instance, to the county commissioners for an estimate of the damages suffered by the petitioners, or that the county commissioners had ever made any estimate of such damages, or that the petitioners were in fact or in law parties aggrieved by the doings of the county commissioners in the estimation of their damages. Hearing before *Braley*, J., who sustained the motion and dismissed the petitions; and the petitioners having excepted, reported

Digitized by Google

the cases, at the request of the parties, for the determination of this court.

*J. D. Colt*, for Danforth.

*C. K. Cobb*, for the Vale Mills.

*W. F. Wharton*, for the respondent.

KNOWLTON, J. The St. 1897, c. 388, incorporating the Groton Water Company, contains in § 4 the following provision: "Any person sustaining damages as aforesaid under this act, who fails to agree with the said corporation as to the amount of the damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within one year from the taking of such land or other property, or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of the said one year. No application for the assessment of damages for the taking of any water, water right or water source, or for any injury thereto, shall be made until the water is actually withdrawn or diverted by the said corporation under the authority of this act."

The only question in these cases is whether the petitioners are authorized to apply directly to the Superior Court for a jury, without first making application to the county commissioners for an assessment of damages.

When land is taken for the laying out of a highway, an estimation of damages by a jury can only be had upon an application in the nature of an appeal from the decision of the county commissioners by a party aggrieved by their action in such estimation. Pub. Sts. c. 49, §§ 14, 32, 105. The petitioners say that the award by the county commissioners, when a highway is laid out, is made as a part of the original proceeding, and not upon a formal application or petition of the land owner, and therefore contend that the provision for an application in this statute cannot mean an application to the commissioners to make an award. This question has been carefully considered by this court and settled adversely to the contention of the petitioners in a series of cases. *Worcester* v. *County Commissioners*, 100 Mass. 103. *Riley* v. *Lowell*, 117 Mass. 76. *Patch* v. *Boston*, 146 Mass. 52, 54. In the first of these cases Mr. Jus-

Digitized by Google

tice Hoar said, in the opinion of the court: "The general policy of the law in regard to private property taken for public use is undoubtedly this: that the estimate of damages shall be made in the first place by or under the authority of some tribunal by whom it can be made more promptly and cheaply than by the intervention of a jury. . . . In the cases of highways and railroads, the county commissioners are the tribunal; and in regard to town ways, the selectmen, or the mayor and aldermen of cities." The adjudications in these cases make it clear that, although there need be no application to county commissioners to estimate damages when land is taken for a highway, inasmuch as it is their duty to estimate them of their own motion as a part of the original proceeding, the application called for under statutes like that before us is an application to the county commissioners to make an award.

It is contended that these cases were not rightly decided, or that if they were, the fact that under the present statute the application cannot be made until the water is actually diverted, and that it must be made within a year after the taking, calls for a different decision. We see no reason for overruling our decisions, or for making a distinction between the cases cited and the present case. It is said that the statute as construed by the Superior Court is indefinite and uncertain as regards the time when the application for a jury shall be made; but we see no such uncertainty. The one year within which an application for a jury may be made under Pub. Sts. c. 49, § 33, is "one year from the time of the adoption of the order," which means the order of the commissioners relating to damages. Under the statute before us the party aggrieved would have a year from the time of making the award or assessment of damages by the county commissioners within which to apply for a jury.

*Petitions dismissed.*

Digitized by Google

# NATIONAL CONSTRUCTION COMPANY *vs.* TRAVELERS' INSURANCE COMPANY.

Suffolk. March 8, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Employers' Liability Insurance — Construction of Policy — Waiver of Condition.*

There is no waiver of performance of a condition in a policy of insurance against liability that "immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession of the insured in any way relating to such accident," even if there is evidence that the defendant company was informed of the fact that the plaintiff at about the time of the accident had certain knowledge, unless at least the defendant knew that it not merely was dispensing with a further report, but also was doing away with an already absolute defence.

CONTRACT, upon a policy of insurance issued by the defendant against the liability of the plaintiff, for "accidental bodily injuries under circumstances which shall impose upon the insured a common law or statutory liability therefor." At the trial in the Superior Court, before *Lilley*, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which, *Lilley*, J., having resigned, were allowed by *Mason*, C. J., under St. 1894, c. 412. The facts appear in the opinion.

*S. Lincoln*, for the defendant.

*W. Schofield & C. F. Appleton-Smith*, for the plaintiff.

HOLMES, C. J. This is an action upon a policy of insurance against liability. The plaintiff incurred a liability within the policy and suffered a judgment. The defendant set up the breach of a condition that "immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession of the insured in any way relating to such accident." At the trial the plaintiff contended that it had no knowledge definite enough to call for a notice during the time of its failure to give notice, and that the defendant had waived performance of the condition. The defend-

Digitized by Google

ant asked the judge to rule that there was no evidence that the plaintiff gave the notice required or that the defendant waived the condition, and to order a verdict. The requests were refused, and the case is here on exceptions to these refusals and to instructions in the charge inconsistent with the requests.

The plaintiff's liability was for personal injuries to one Bridget Nelson, suffered by her in Malden, in August, 1893. The evidence of waiver relied on is simply that when Bridget Nelson brought an action against the city of Malden, and notice was sent by the city to the plaintiff and by the plaintiff to the defendant to defend the action, the defendant, in the language of its general manager, "did not refuse to look after the matter, in accordance with the terms of its policy." But the letter in which these words occur protested that the defendant had learned of the plaintiff's knowledge only within a few days, and insisted on the forfeiture. On September 11, 1894, the day this letter was written, the defendant abandoned the defence of the action against Malden, and later it declined to assume the defence of the action against the plaintiff, for the reason now insisted upon.

The general superintendent of the plaintiff testified that he heard of the accident the next morning after it happened, with some particulars, and the name of the driver of a car connected with or close to the accident. Within a month he knew the name of the woman who was hurt. He directed a subordinate to see the driver and to make a report, but no word was sent to the defendant before March, 1894. If this testimony was believed, there was a clear breach of condition. It is unnecessary to rehearse other evidence on the same point. A part of it at least seems to have been undisputed. Whether the plaintiff knew more or less, it was bound to give immediate notice to the defendant of all the knowledge it possessed if it wanted to save the policy.

In his instructions to the jury the judge allowed them to find a waiver if the superintendent knew no more about the accident before March 4, 1894, than was communicated to the company. As there was no evidence of any communication before March, this instruction meant that the jury might find a waiver if the plaintiff in March told all that it then knew.

Digitized by Google

But if the superintendent knew what he testified that he knew, there was a breach of the condition before March, for the superintendent's knowledge was all acquired within a month or so from the accident in August, 1893; and it could not be contended that a report or communication in March, 1894, was seasonable. *Mandell* v. *Fidelity & Casualty Ins. Co.* 170 Mass. 173, 177. There was no evidence that the defendant was informed of the fact that the company at about the time of the accident had this knowledge; and if that fact was true, the supposed waiver would not be effectual unless at least the defendant knew that it not merely was dispensing with a further report, but also was doing away with an already absolute defence.

For the purposes of the case we may assume without deciding that the clause of the policy, "no agent has authority to waive or alter anything in this policy," would not apply to conduct of the general manager, that the defence of the first suit would be evidence of a waiver if the defendant knew of the forfeiture, and that the defendant could waive its defence conclusively by a simple election to do so. *Oakes* v. *Manufacturers' Ins. Co.* 135 Mass. 248, 249. *Roby* v. *American Central Ins. Co.* 120 N. Y. 510, 517. But still if the testimony was true which showed that the plaintiff had received information which should have been communicated to the defendant long before March, 1894, there was no evidence of a waiver because there was no evidence that the fact of the plaintiff's previous information and forfeiture of its rights under the policy was known to the defendant.

We have little doubt that the judge at the trial took the same view of the law that we do, and a portion of the charge comes very near to expressing it, but he also used language which naturally would be understood to make the only question to be whether the plaintiff communicated its information about the accident in March; he used this language at the end of the charge; and upon his attention being called to the point he said that he would leave that as it was.

*Exceptions sustained.*

Digitized by Google

DANIEL J. McCARTY, administrator, *vs.* WILLIAM NUGENT & trustee.

Suffolk. March 9, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Trustee Process — Costs.*

The provisions of Pub. Sts. c. 183, § 86, do not give a discretion as to the right of the trustee to receive costs.

HOLMES, C. J. This is an action of contract in which the plaintiff has had judgment and a party summoned as trustee has been charged. A part of the order of the Superior Court is, "No costs allowed trustee or adverse claimants." The trustee appeals to this court from so much of the order as allows him no costs. Adverse claimants had been admitted as parties, and the action of the Superior Court presumably was under Pub. Sts. c. 183, § 86. But it is settled "that it was not intended [by that section] that a discretion should be exercised, upon the question of the right of the trustee to receive costs until he is charged or discharged; but only in relation to the party by whom his costs shall be paid." *Morrison* v. *McDermott*, 6 Allen, 122, 123. It follows that the trustee is entitled to his costs.

*Order disallowing costs to trustee reversed.*

*J. Ballantyne*, for the trustee.

*T. F. Meehan*, for adverse claimants.

Digitized by Google

## SARAH CHISHOLM *vs.* NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Suffolk. March 9, 12, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Personal Injuries — Master and Servant — Employers' Liability Act — Assumption of Obvious Risk.*

At the trial of an action under St. 1887, c. 270, § 1, cl. 2, for injuries sustained by a lineman in the employ of the defendant by contact with an electric wire of a third person at a point where, by the chafing of the wire against a tree, the insulation had been worn off and the tree charred, it appeared that the defective insulation and the charred spot on the tree were concealed by foliage and were unknown to the defendant or his foreman under whose orders the lineman was working, and it was doubtful whether the indications of danger could not have been more easily seen by the lineman than by the foreman, if they could have been seen by the foreman at all. *Held*, that the action could not be maintained.

TORT, under St. 1887, c. 270, for damages for the death of the plaintiff's husband, caused by the alleged negligence of the defendant. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

The deceased was a lineman in the defendant's employ, and, under the direction of the defendant's foreman one Eachern, who had sole charge of the work, was engaged in suspending a cable of the defendant from a taut wire strung between poles by which it was supported. By the order of the foreman the deceased and a fellow workman, one Cameron, had prepared and suspended from the taut wire a boatswain's chair in which the deceased was seated, and which, as he fastened the cable, was drawn along the wire by his fellow workman. The two men were left to do the work themselves under the charge of the foreman, who stood near Cameron on the ground. After the deceased had fastened the cable for three or four hundred feet from the place where he was set to work, he came to a tree by contact with which the insulation of a highly charged wire belonging to another company and suspended upon the same poles had been worn off. In undertaking to pass this tree his

Digitized by Google

foot touched the wire at the point of defective insulation and he was instantly killed by the shock. The tree had previously been burned by the electricity, but the marks of burning and the defective condition of the wire were concealed by twigs and foliage. At the time of the accident there was a standing order of the defendant that its linemen should examine poles before ascending them.

Cameron, called as a witness by the plaintiff, testified as follows: "*Q.* Was it possible to see this bare spot on that tree? Could you see that bare spot on that tree, standing on the ground, under which Chisholm got hurt? *A.* Well, if I was interested in doing the work myself, I could see it; anybody could. — *Q.* Could the bare spot on the wire have been seen by Chisholm as he was sitting doing his work in the boatswain's chair? *A.* No, sir. — *Q.* Will you tell us why you could not see it? *A.* Because I was too far above it. It was way down, and I attended to something different from my feet. — *Q.* If you looked? *A.* I was looking in my own direction, and I was n't looking toward my feet. I could n't without making a special of it. — *Q.* Will you describe to the jury what the condition of that tree was around this burned spot which you spoke about? *A.* It was an old scraggly tree. — *Q.* Was there anything else on the tree beside the bark around the spot that was burned? *A.* You can generally tell. — *Q.* Talk about this particular tree. Was there anything about this spot? *A.* There was nothing but a young growth growing right over the place where the injury was. — *Q.* These little shoots that grew out about the injury — would that have anything to do in obstructing the view of a person sitting in the chair the same as Chisholm was? *A.* Certainly — the foliage. These little twigs interfered. If you wanted to see you could n't see."

There was also evidence that the foreman went up the pole where the deceased was killed to take down his body, and received a severe shock himself. At the close of the evidence for the plaintiff, the judge, at the request of the defendant, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

*J. W. Corcoran & W. B. Sullivan*, for the plaintiff.

*J. Lowell & J. A. Lowell*, for the defendant.

Digitized by Google

HOLMES, C. J. This is an action brought under St. 1887, c. 270, to recover for the death of the plaintiff's husband. The deceased was a lineman in the defendant's employ, and was engaged in suspending a cable of the defendant from a taut wire, when his feet came in contact with an exposed and highly charged wire of another company which had its wires upon the same poles, and he was killed by the shock. The action is based upon the alleged negligence of the person exercising superintendence.

The deceased was in a boatswain's chair suspended from the taut wire, and a fellow workman drew him along as he fastened the cable. These two were left to do the work themselves, under the charge of a foreman who was standing near the man on the ground. They had worked along from three to four hundred feet from the place at which they were set to work, when they came to a tree; and the accident was due to the insulation of the wire above mentioned having been worn off by contact with the tree. The tree had been burned by the electricity, but the deceased was not likely to see the marks when engaged upon his work, and we assume that the evidence might have been taken to mean that he could not have seen them if he had looked. We assume also that the foreman could have seen them from some points on the ground, although a fair interpretation of the evidence leaves it doubtful whether the marks were more visible from the ground than from the boatswain's chair. Twigs and foliage had grown from the tree in such a way as to hide them. There was no evidence that the foreman actually knew of the defect or of the marks which might have given warning of it. The judge before whom the case was tried directed a verdict for the defendant, and the plaintiff excepted.

We are of opinion that the direction was right. It was a standing order of the defendant's that linemen should examine poles before ascending them. The danger from an imperfectly insulated wire is the most characteristic risk which a lineman has to encounter. That general risk the deceased assumed by entering upon his employment. Everybody knows that there always is a chance that the insulation of a wire may become worn off or defective from some cause, and that in a circuit of

Digitized by Google

miles there is more than a chance that such an event will happen somewhere. *Junior* v. *Missouri Electric Light & Power Co.* 127 Mo. 79.

There was nothing in the circumstances of this case to shift the risk. The wire did not belong to the defendant, and its dangerous condition was not due to the defendant's negligence, as in *Murphy* v. *City Coal Co.* 172 Mass. 324. The deceased was not sent without warning to a place in the defendant's control, which was known by it to be dangerous, and which could and should have been made safe or warned against, as in *Willey* v. *Boston Electric Light Co.* 168 Mass. 40. The foreman's order had no special reference to the place of the accident. It was merely a general order to do the work of suspending the cable, given when the work began, between three and four hundred feet away from where the deceased was killed.

There is no evidence that the foreman knew of the danger either when he gave the order or later. Indeed it is plain that he did not know it, as he went up the pole where the deceased was killed and received a severe shock himself. He did not purport to be guarding the deceased from danger, and his mere presence in the neighborhood did not impose upon him the duty to do so. We may add, although it is not necessary, that if the evidence is taken at all strictly it does not appear that the foreman could have seen the indications on the tree from any place where he was, but merely that there was a place on the ground to which the foreman might have gone and from which the indications might have been detected, a most inadequate reason for holding the defendant.

*Exceptions overruled.*

Digitized by Google

## COMMONWEALTH *vs.* JACOB ROZEN & another.

Suffolk. March 12, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Counterfeiting Trade-marks — Certificate — Partnership — Verification by Oath — Statement no Ground for invalidating Registration — Intention — Statute.*

It is sufficient if the certificate required to be filed under St. 1893, c. 443, relative to trade-marks gives the name of a partnership; and the declaration required by the statute may be verified by the oath of one of the partners.

At the trial of a complaint for using counterfeit trade-marks it appeared that two of the certificates, required by St. 1893, c. 443, to set forth the length of time, if any, during which the trade-mark had been in use, read "since about 1888," and a third "since the year 1888," and that the two former had in fact been in use two or three years and the latter some nine years or more. *Held*, that the difference was to the disadvantage of the applicants, if anybody; and that it was no ground for invalidating the registration.

If at the trial of a complaint for using counterfeit trade-marks there is no evidence as to where the defendants intended to sell the goods or where the firms having the trade-marks sold theirs, beyond the fact that all parties concerned had their places of business in Boston, it is a sufficient answer to the objection that enough does not appear to make the act constitutionally applicable to the defendants, and that a verdict should have been directed for them as requested, that if it would be a defence to show that goods to which counterfeit trade-marks had been attached in this State were intended solely for sale in other States, the defendants were called upon to give some evidence of the intent. The government made out at least a *prima facie* case by establishing the facts admitted.

COMPLAINT, for using counterfeit trade-marks on cigars. Trial in the Superior Court, before *Bond*, J., who refused to direct a verdict for the defendants, and to rule that St. 1893, c. 443, was unconstitutional.

The jury returned a verdict of guilty; and the defendants alleged exceptions, which appear in the opinion.

*S. H. Tyng*, (*B. H. Greenhood* with him,) for the defendants.

*J. D. McLaughlin*, Second Assistant District Attorney, for the Commonwealth.

HOLMES, C. J. This is a complaint under St. 1895, c. 462, § 4, for using counterfeit trade-marks upon cigars. The defendants admitted that they were guilty subject to the question whether there was a valid registration of the trade-marks, including the question whether the statute was constitutional in



Digitized by Google

its application to this case. These questions were raised by requests for rulings which need not be repeated at length, and come here on exceptions.

The trade-marks were recorded under St. 1893, c. 443, but it is not disputed that if properly recorded the liability for counterfeiting them is preserved by § 7 of the later act.

The act of 1893 provides that a "person, association, or union" that has adopted a trade-mark as therein provided (see § 1) may file the same for record, etc., and "shall file therewith a certificate specifying the name or names of the person, association, or union so filing" the same, etc. § 4. The trade-marks in question were recorded by three firms, Alles and Fisher, Breslin and Campbell, and Henry Traiser and Company, and the certificate in each case gave only the firm name as the name of the person, etc., so filing. It is argued that partnerships can come into this section only under the word "person," as "association" and "union" are shown by the context to mean associations like trade unions, that have officers, that the person who files is the person who has adopted the trade-mark under § 1, and that when those who have adopted and filed are more than one their names must all be set forth, as recognized by the words "name or names" above quoted.

We think that this argument puts into the statute a preciseness of specification that is not there. The words "name or names" are satisfied if applied to the case of two or more persons who have no conventional joint name. Perhaps other cases could be imagined. But the policy of the statute does not require all the names of the co-owners of a trade-mark, as is shown by its terms when the co-owners are an unincorporated association with officers. There is no more reason for requiring all the names of an ordinary partnership to be set out than there is for a similar requirement in the case of a larger one organized like the one referred to in *Phillips* v. *Blatchford*, 137 Mass. 510. The recording of trade-marks by ordinary partnerships is contemplated expressly in the words of the oath to be mentioned in a moment. An ordinary firm name gives more information about the members who compose the partnership than the name of a larger unincorporated association would give. If the words of the statute are to be taken with grammatical nicety upon a ques-

Digitized by Google

tion evidently not before the minds of the Legislature, we may say that the firm is a "person" within the meaning of that word, or we may extend the word "association" to include associations without as well as with officers. See *Smith* v. *Reynolds*, 10 Blatchf. 100.

The statute further requires the certificate to be "accompanied by a written declaration, verified under oath by the person or some officer of the association or union by whom it is filed, to the effect that the party so filing such . . . trade-mark . . . has a right to the use of the same, and that no other person, firm, association, union, or corporation has the right to such use," etc. § 4. The declarations accompanying the certificates in question were verified in each case by the oath of only one partner, and this again is urged as a failure to comply with the conditions of the act. Evidently the office of the Secretary of the Commonwealth has not understood the act to be so precise in this any more than in the last mentioned requirement, as is apparent from the practice in the three instances before us; and we are of opinion that its understanding and practice are right. The oath of one of the persons by whom the trade-mark is filed is enough by the words of the statute when he is an officer of an unincorporated association. We are of opinion that it equally is so when he is the member of a firm. Whether if we had construed the statute more strictly a failure to comply with it exactly could be set up here, after the Secretary of the Commonwealth had issued his certificate, we have not considered. See *Whittemore* v. *Cutter*, 1 Gallison, 429, 433; *Crompton* v. *Belknap Mills*, 3 Fisher, Pat. Cas. 536, 541; *Seymour* v. *Osborne*, 11 Wall. 516, 540, 541; *Hoe* v. *Cottrell*, 17 Blatchf. 546, 549.

The statute further requires the certificate to set forth the length of time, if any, during which the trade-mark has been in use. Two of the certificates read "since about 1888," and one, "since the year 1888." The former two trade-marks, in fact, had been in use two or three years, and the latter some nine years or more. It is objected that the time should have been set forth truly and in precise form. But the difference was to the disadvantage of the applicants, if of anybody, and is no ground for invalidating the registration.

There was no evidence as to where the defendants intended to

Digitized by Google

sell their cigars, or where the firms having the trade-marks sold theirs, beyond the fact that all parties concerned had their places of business in Boston. It is objected that enough did not appear to make the act constitutionally applicable to the defendants, and that a verdict should have been directed for them as requested. To this it is a sufficient answer that if it would be a defence to show that goods to which counterfeit trade-marks had been attached in this State were intended solely for sale in other States, the defendants were called on to give some evidence of the intent. The government made out at least a *prima facie* case by establishing the facts admitted here. See *Commonwealth* v. *Kennedy*, 108 Mass. 292, 294; *Commonwealth* v. *Gagne*, 153 Mass. 205, 210; *Harris* v. *Quincy*, 171 Mass. 472, 473.

*Exceptions overruled.*

---

COMMONWEALTH *vs.* JAMES MULLEN.

Suffolk. March 13, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Imitation Butter — Complaint — Allegation — Statute — "Proviso."*

A complaint under St. 1891, c. 58, as amended by St. 1896, c. 377, § 1, for having in possession with intent to sell oleomargarine in imitation of yellow butter produced from unadulterated milk or cream, may be made by an assistant of the board of agriculture.

A complaint under St. 1891, c. 58, as amended by St. 1896, c. 377, § 1, which alleges that the oleomargarine was in imitation of yellow butter produced from unadulterated milk or cream, sufficiently shows that the proviso "that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter," does not apply.

A motion to quash a complaint under St. 1891, c. 58, as amended by St. 1896, c. 377, § 1, on the ground that it does not allege that the substance "was not renovated butter," is rightly overruled, having renovated butter in possession with intent to sell being made an offence by another statute.

A motion to quash a complaint under St. 1891, c. 58, as amended by St. 1896, c. 377, § 1, on the ground that "the complaint is in the alternative when it alleges that the substance was made from adulterated cream or milk," is rightly overruled, the complaint making no such averment, but alleging that the oleomargarine was made partly out of oleaginous substance not produced from unadulterated milk or cream.

Digitized by Google

COMPLAINT to the police court of Chelsea, alleging that the defendant "did have in his possession, with intent to sell, a certain quantity, to wit: one pound of a certain product commonly called oleomargarine, made partly out of oleaginous substance not produced from unadulterated milk or cream from the same, and that said product, in his possession, as aforesaid, was then and there, in imitation of yellow butter, produced from pure unadulterated milk or cream of the same."

The defendant was found guilty, and appealed to the Superior Court. At the trial, before *Sheldon*, J., who overruled a motion to quash the complaint, the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

*H. L. Whittlesey*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth.

HOLMES, C. J. This is a complaint under St. 1891, c. 58, (amended by St. 1896, c. 377, § 1,) for having in possession with intent to sell oleomargarine which was in imitation of yellow butter produced from unadulterated milk or cream. The case is here on appeal from an order overruling a motion to quash, and on exceptions to the same order, (see *Commonwealth* v. *Dunleay*, 157 Mass. 386, 388, and *Commonwealth* v. *McGovern*, 10 Allen, 193,) and to a refusal to rule that the complaint could not be sustained on the evidence.

The first objection to the complaint is that it does not allege that the complainant was an inspector of milk, or an officer empowered to make such complaint; and the ground on which the court was asked to direct a verdict for the defendant was that it appeared in evidence that the complainant was not an inspector of milk but was an assistant of the board of agriculture, as described in St. 1891, c. 412, § 6. The ground of the objection and request is that by St. 1891, c. 58, § 3, it is provided that "inspectors of milk shall institute complaints for the violation of the provisions of this act when they have reasonable cause to believe that any of its provisions have been violated," and they are authorized on information and satisfactory evidence to enter, take specimens of suspected butter or imitations, and cause them to be analyzed, etc. It is argued that these are the only

Digitized by Google

officers authorized to make the complaint. To this argument it is a sufficient answer that the same authority is plainly given to the assistant of the secretary of the board of agriculture, by St. 1891, c. 412, §§ 6, 11. As to the form of the complaint, if we should assume for the purposes of decision that only the persons named have authority to make complaints under the act, no doubt under St. 1899, c. 409, § 28, ("Caption and Commencement of Complaint,") the office of the complainant should be alleged, but the defect at most is formal. *Commonwealth* v. *Alden*, 143 Mass. 113, 118. In view of § 5 of the last cited act probably it would not be sufficient ground for a motion to quash. But the short answer to the whole matter is that the statute does not prohibit any person not an inspector from making a complaint. *Commonwealth* v. *Tobias*, 141 Mass. 129, 132. *Commonwealth* v. *Murphy*, 147 Mass. 577. *Commonwealth* v. *Gay*, 153 Mass. 211, 217.

The second ground of the motion to quash was that the complaint "does not allege that the substance was not in a separate and distinct form and in such manner as will advise the consumer of its real character." This means that the complaint should have negatived the proviso, as it stands in § 1 and in the amendment, that the act shall not be taken to prohibit the sale of oleomargarine in a separate and distinct form, etc., "free from coloration or ingredient that causes it to look like butter." The motion disregards these last words. The complaint alleges that the oleomargarine was in imitation of yellow butter produced from unadulterated milk or cream, and thus sufficiently shows that the proviso does not apply. The defendant had no right to keep such a substance for sale in any form or manner. Probably in any case it was unnecessary to negative the proviso. *Commonwealth* v. *Hart*, 11 Cush. 130.

The third ground set out in the motion is that the complaint "does not allege that said substance was renovated butter." We presume that this should have read "was not renovated butter," to express what was intended. Having renovated butter in possession with intent to sell is made an offence by St. 1899, c. 340. That is not the offence charged. The substance described in the complaint is different from that described as renovated butter in the later act, and it is not necessary, when

Digitized by Google

charging a well defined statutory offence, to explain that you are not charging another and quite different one.

The last ground of the motion is, "because the complaint is in the alternative when it alleges that the substance was made from adulterated cream or milk." The complaint makes no such averment. It alleges that the oleomargarine was made partly out of oleaginous substance not produced from unadulterated milk or cream, which is a very different allegation. If all the substances of which the subject matter of the charge was composed were produced either from unadulterated milk or from cream from the same, there would have been no offence under the statute in question; therefore both possibilities were negatived. Very properly this ground is not argued, and we say no more about it.

*Order overruling motion to quash affirmed; exceptions overruled.*

---

## HENRY A. ARNOLD *vs.* EASTMAN FREIGHT CAR HEATER COMPANY.

Suffolk. March 15, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Personal Injuries — Evidence — Expert — Negligence — Assumption of Risk.*

If the difficulty with a question put to an expert is that the ability of the witness and his own opinion of it are immaterial to the questions upon trial, the question is rightly excluded.

An employee, having accepted the responsibility of arranging and moving a staging from which he falls and is injured, cannot be heard to say that it was negligence in the defendant to clothe him with the responsibility.

TORT, for personal injuries received through a fall from a painter's staging while engaged in painting the defendant's factory. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions in substance as follows. The defendant was a manufacturer of apparatus for heating freight cars, and the plaintiff had been employed as a mechanic since 1884 about its

Digitized by Google

factory. He had also repaired freight cars on the road. He had painted freight cars at various times, but had never painted a building before. The plaintiff was told by the defendant's foreman to get a stage from a painter, and he did so. The stage consisted of two spreaders adapted to be hung by ropes from the roof of a building, with a ladder stretched between them and covered with boards. Each spreader was in the shape of a triangle, with the rope attached to its upper end, and at the lower end a wheel which rested against the building and allowed the spreader to be raised and lowered easily. The ropes which supported the spreader were provided with hooks to fasten them to the roof. The factory had a flat roof which was covered with tar and gravel. A board, called a coping, ran around the edge of the roof to prevent the gravel being washed off. The coping projected slightly above the roof all the way around. In order that the hooks should not tear the roof they were each placed in a hole in a small board which was then rested on the coping.

The plaintiff had entire charge of hanging the staging on the roof, and had moved the staging seven times before the accident. He had been alone on the roof each time, and had put the boards and the hooks where he pleased. He had put the boards on the coping each time, but never examined the coping. The last time that the plaintiff hung the staging it fell as soon as he got on to it. The fall was occasioned by the coping giving way. The coping at the place where the stage was last hung consisted of a short, narrow piece of board held on by four small nails which were old and rusty. The plaintiff could have discovered this fact if he had examined the coping, or had hit it with a hammer; but he did not do so.

An expert having testified that in his opinion the coping board two inches wide and fastened to the building by four small nails only was an unsafe support for the staging carrying three men, was then asked whether, if he had been requested as an expert to examine the board and its attachment to the building he could have discovered its condition. The question was excluded and the plaintiff excepted.

At the conclusion of the evidence for the plaintiff the judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

Digitized by Google

*W. C. Wait*, for the plaintiff.

*J. Lowell & J. A. Lowell*, for the defendant.

BARKER, J. 1. An expert having testified that in his opinion the coping board two inches wide and fastened to the building by four small nails only was an unsafe support for the staging carrying three men, was then asked whether, if he had been requested as an expert to examine the board and its attachment to the building he could have discovered its condition. The question was excluded, and the plaintiff excepted. Assuming, as the plaintiff assumes in his brief, that the answer would have been in the affirmative, the difficulty with the question is that the ability of the witness, and his own opinion of it, were immaterial to the questions upon trial.

2. The verdict for the defendant was ordered rightly. He could properly leave to workmen the matter of the staging which they were to use. See *Adasken* v. *Gilbert*, 165 Mass. 443; *McKay* v. *Hand*, 168 Mass. 270; *Brady* v. *Norcross*, 172 Mass. 331. The plaintiff was a mature workman. Having accepted the responsibility of arranging and moving the staging, he cannot be heard to say that it was negligence in the defendant to clothe him with the responsibility. He was given no directions and asked for none, but did the work to suit himself. He chose to have the strain of the staging come against the coping boards, and he himself arranged and placed the apparatus. He went upon the roof, and he had full opportunity to examine the coping boards before adopting that method of holding up the staging, and also before causing it to be moved from place to place. It was obvious that if a board should give way the staging would fall. Without saying that, as matter of law, he was himself negligent, upon the evidence he assumed the risk of any danger due to the manner in which he caused the staging to be supported.

*Exceptions overruled.*

Digitized by Google

## EUDORA M. FAXON *vs.* ELIZABETH T. JONES.

Suffolk. March 22, 1900. — May 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Unlawful Exclusion from Rooms in Hotel — Question of Fact for the Jury.*

In an action for an eviction or an unlawful exclusion of the plaintiff from his rooms in a hotel, the question whether there was a real and substantial exclusion or merely a temporary holding of the keys incident to the care of the rooms until the plaintiff should return and give the defendant an opportunity to converse with him, is one of fact for the jury.

TORT, for an eviction or an unlawful exclusion of the plaintiff from her rooms in the Hotel Huntington in Boston. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.*

*A. H. Latham*, for the plaintiff.

*R. W. Frost*, for the defendant.

KNOWLTON, J. The plaintiff took the rooms under a lease from the defendant's husband, which contained a clause authorizing the landlord to enter peaceably and take and hold possession for non-payment of rent. After the expiration of the lease the plaintiff held over under an oral agreement with the landlord that she might do so. She afterwards paid rent at the same rate, and she must be deemed to have held over under the terms of the lease. *Dimock* v. *Van Bergen*, 12 Allen, 551. *Weston* v. *Weston*, 102 Mass. 514, 518. The defendant had general superintendence of the housekeeping department of the hotel, and it was a part of her duty to take measures to clear out vermin found in any of the rooms. The plaintiff's rooms were taken care of by the servants of the hotel acting under the defendant's direction, and there was evidence that during the occupation of the plaintiff the rooms had become infested with bed bugs which had been seen crawling over the furniture to such an extent that it was distasteful to do chamber

* For another decision growing out of the same transaction, see *Faxon* v. *Jones*, *post*, 206.

Digitized by Google

work there. The plaintiff was a physician having an office on Winter Street, and on January 6, 1896, according to the testimony of her son, when he went out of the rooms on his way to luncheon he locked the doors and left the keys in the front room, throwing them over the transom, and when he returned they were gone. He said that he saw the defendant about three quarters of an hour afterward, and she said that she had taken the keys to compel the plaintiff to come and see her. On cross-examination he testified that he had a key that would unlock the door of the front room, and that the plaintiff knew it, and that he unlocked the front door when he returned from luncheon, and went away and left it unlocked. The plaintiff afterwards returned from her office to the hotel, and there was more or less trouble between her and others in regard to the keys.

The defendant testified that she had received information in regard to the vermin in the plaintiff's rooms, and had twice attempted to secure interviews with the plaintiff in regard to the subject, that she had called on the plaintiff and had sent a message on the Saturday previous, that on this day "she requested the chambermaid to bring the keys of the plaintiff's rooms to her, and that she retained the keys because she wished to see the plaintiff personally; . . . that after receiving the keys from the maid she gave them to the clerk and told him to keep them until some member of the plaintiff's family returned, and when they did, to ask them to go to the defendant's apartment and see her. Subsequently she received a written note from the plaintiff saying that if her keys were not given to her at once she was advised to break in the door; that the defendant then supposed the doors were locked; that the defendant then talked with the plaintiff in the public hall; that previous to this she had an interview with the plaintiff's son and told him that she wished to see his mother personally and that she did not wish to say anything about it to him or his sister; that she offered to let him go into the room if he wished, but he declined."

The jury were instructed that inasmuch as it was admitted that the rent was overdue, the landlord or any person authorized to represent him would have a right to enter and take possession of the rooms, if he could do it peaceably, for the purpose

Digitized by Google

of terminating the tenancy, and instructed them further that such an entry could be made lawfully only if it was made for the purpose of terminating the tenancy, and he twice told them that he did not understand that there was any evidence in the case that an entry was made for this purpose. He then instructed them that the defendant had no right to exclude the plaintiff from her rooms, and he left to them the question whether she had excluded the plaintiff so that she could not enter. This last instruction was given at the request of the plaintiff, and there was no contention, so far as appears from the bill of exceptions, that there was not evidence which made it proper to submit the question to the jury. We infer from the evidence that the chambermaid who took care of the rooms under the direction of the plaintiff was the proper custodian of the keys during the plaintiff's absence from the house. It was proper for the defendant to make reasonable efforts to obtain an interview with the plaintiff in regard to the condition of her rooms. There was evidence that the plaintiff's son, all the time, had a key to the front room, and that the plaintiff knew it, and that the defendant offered to give him admission. It was a question for the jury on the whole evidence, whether there was a real and substantial exclusion of the plaintiff from her rooms, or merely a temporary holding of the keys incident to the care of the rooms until the plaintiff should return and give the defendant an opportunity to converse with her. By the plaintiff's own admission, when she inquired for the keys at the office, she was asked to call at the defendant's apartment, and she supposed she could get the keys there.

The statement to the jury about the right of the landlord to take possession under the provisions of the lease was in explanation of the relations of the parties, and not to authorize them to find an entry to terminate the tenancy when they were twice told that there was no evidence of an entry for such a purpose.

The evidence which was excluded related only to the question of damages, and the finding for the defendant makes it unnecessary to consider it.

*Exceptions overruled.*

Digitized by Google

## SILLMAN C. BASSETT *vs.* WILLIAM A. DREW.

Suffolk. January 10, 1900. — May 18, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Right of Action not accruing until after Two Years from giving of Administration Bond — Statute.*

A promissory note secured by mortgage upon real and personal estate, which matures more than two years after the giving of bond by the administrator of the deceased maker, is a debt for which provision is made by Pub. Sts. c. 136, § 18, and therefore is not within the provisions of §§ 26 and 27, whether the personal estate be sufficient or not to pay it.

CONTRACT, to recover a balance of $1,600 with interest due on a promissory note for $4,000 against the devisee in trust under the will of Russ B. Walker, the maker of the note. Writ dated August 29, 1898. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

The note was payable to the order of the plaintiff, dated March 18, 1893, on five years' time, and secured by a mortgage on real and personal property, which on the same day the plaintiff had conveyed to him. Subsequently Walker sold the equity to one who after Walker's decease conveyed it to Walker's widow. Walker died on August 25, 1894, and his widow was appointed administratrix with the will annexed of his property in Maine, where he had lived. She took out ancillary administration in Massachusetts, giving bond in the Probate Court of Suffolk County, on May 2, 1895, and published notices of her appointment in compliance with the law.

The property of the deceased in Maine realized $1,159. His property in Massachusetts consisted of real estate appraised at $8,600, and a small amount of personal property. By his will he gave all his property, after payment of a few small legacies, to the defendant in trust.

On July 27, 1897, more than two years after giving bond, the administratrix filed her final account in Suffolk County, and about the same time filed one in Maine. Both accounts

Digitized by Google

were then allowed and the settlement of Walker's estate was complete.

The plaintiff never presented this note to the Probate Court. On November 27, 1897, as Walker's widow, who then held the equity, had made default in payment of interest on the note, the plaintiff foreclosed his mortgage under the power of sale, and purchased the premises himself for $2,600.

This action is to recover the difference between the amount for which the plaintiff had bought in the mortgaged premises and the amount of the mortgage note.

*C. F. Chamberlayne*, for the plaintiff.

*H. M. Burton*, for the defendant.

HAMMOND, J. It is recited in the preamble to St. 1788, c. 66, that theretofore executors and administrators had frequently suffered "great loss and trouble by reason of demands brought against them after they have closed their accounts of administration, and settlement of the estate they have administered is made among the heirs or devisees," and that "for remedy whereof, as well as for the more speedy settlement of estates," the statute is passed.

Prior to this statute there does not seem to have been any statute of limitations applicable only to claims against executors and administrators. See Dane, Abr. c. 29, art. 1. This statute set a time within which actions must be brought against an executor or administrator. It divided the obligations of the deceased into three classes: First, those due and payable within that time; second, those due and not payable within that time; third, all other obligations, including those where the liability depends upon some contingency not happening within that time, and which might never happen.

A claim of the first class not presented within the time was barred, and there could be no recovery against anybody. A holder of a claim of the second class could file his claim in the office of the Probate Court before the expiration of the time, and the judge of probate was directed thereupon to order the executor or administrator to retain in his hands assets to answer the demand unless some one or more of the heirs or devisees should give sufficient security for the executor or administrator to respond to the demand. And in such case the executor or

Digitized by Google

administrator was not allowed to hold the assets, and the remedy was against the estate of the deceased in the hands of the heirs or devisees or their heirs or assigns.

With certain changes and amendments not material to this discussion the policy thus adopted has continued to the present time. St. 1791, c. 28. St. 1792, c. 33. Rev. Sts. c. 66, §§ 3, 5; c. 70, §§ 13, 14. St. 1852, c. 294, § 1. Gen. Sts. c. 97, §§ 5, 8; c. 101, §§ 31, 32. Pub. Sts. c. 136, §§ 9, 13, 26, 27.

In speaking of this policy and the statutes, *Shaw*, C. J., in *Hall* v. *Bumstead*, 20 Pick. 2, 3, says: "In this Commonwealth, the liability of heirs for the debts of an ancestor, depends wholly upon statute, and is provisional only. . . . Here, it is the policy of the law to make all property liable for all the debts of the deceased owner, and in the first instance to place it under the administration of an executor or administrator; and in pursuance of the same policy, land is made assets provisionally in the hands of the administrator, after the personal property is applied." And again, in the same case, on page 6, he says: "By the policy and provisions of our laws, the remedy of a creditor upon the heirs or devisees of a deceased person, is extremely limited. Every demand which can be made and enforced against the estate of a deceased person, is to be pursued against the administrator where it can be done, and the whole estate, personal and real, is in effect made assets in his hands to meet such claims." See also *Royce* v. *Burrell*, 12 Mass. 395.

In *Pratt* v. *Lamson*, 128 Mass. 528, it was held, in accordance with the plain reading of the statute, that a promissory note maturing after two years from the time of the giving of the bond by the executor is a debt for which provision is made under Gen. Sts. c. 97, § 8, now Pub. Sts. c. 136, § 13, and that the creditor not having presented his claim to the Probate Court, under that section, could not maintain an action thereon under Gen. Sts. c. 101, § 31, against the legatees of the deceased. That case is decisive of this unless a distinction can be made in favor of the plaintiff.

The plaintiff, however, contends that where the personal assets do not appear to be sufficient to pay the claim, or where they are merely nominal, it would be useless to order the administrator to do that which he cannot do; that therefore an appli-

Digitized by Google

cation under § 13 would be a useless and idle ceremony which the law would not require; and that as the claim could not thus be paid in full it is a claim "for which provision is not made in" the thirteenth section, and so is within Pub. Sts. c. 136, §§ 26, 27; and in support of his position he relies upon *Clark* v. *Holbrook*, 146 Mass. 366, and *Forbes* v. *Harrington*, 171 Mass. 386, but in neither of these cases was the question involved. Such a view of the thirteenth section arises from a misconception of the object and legal effect of the proceedings under it.

The object of the proceedings under that section is not to collect the claim presented, for it has not yet become payable, nor even to adjudicate finally the question of its validity, (Pub. Sts. c. 136, §§ 14, 27,) but simply to extend the time for its collection beyond the time within which otherwise by the special statute of limitations it would be barred.

Upon such an application, if it appears to the court that the claim is or may become justly due, the court "shall order the executor or administrator to retain in his hands sufficient to satisfy the same." But if a person interested in the estate offers to give a sufficient bond to the alleged creditor for the payment of the claim "in case it is proved due," the court may order such bond to be taken instead of requiring assets to be retained as aforesaid. Section 15 provides that the action shall be brought against the administrator if he has been required to retain assets, otherwise upon the bond.

If the order to retain assets is passed, and in the action against the administrator judgment is recovered by the plaintiff, execution issues therefor against the estate of the deceased, real and personal, in the hands of the administrator, just as in the case of a suit upon an ordinary claim within the two years, and the real property belonging to the estate is assets in his hands for that purpose; and, if the personal assets in his hands are insufficient to satisfy the claim, it is his duty to apply for license to sell and to sell real estate, and to apply the proceeds or so much thereof as may be necessary to the satisfaction of the claim. If the Probate Court refuses to order assets to be retained or a bond to be given, then the creditor, by the plain reading of Pub. Sts. c. 136, § 27, can hold the heirs or devisees answerable, because it is then a case where the claim has been presented under the thirteenth section, and has not been allowed.

Digitized by Google

An order under § 13 to hold assets, even if there be no personal assets in the hands of the executor or administrator, is not without effect. On the contrary, the legal effect is to hold the executor or administrator answerable for the claim beyond the special statute limitation of two years, and extends the lien upon the real estate of the deceased for the satisfaction of the claim. It puts the creditor upon the same ground with reference to the real estate of the deceased as one who has brought suit within the two years. *Hall* v. *Bumstead*, 20 Pick. 2. *Bacon* v. *Pomeroy*, 104 Mass. 577. *Edmunds* v. *Rockwell*, 125 Mass. 363. *Hammond* v. *Granger*, 131 Mass. 351.

In proceedings before the Probate Court under this thirteenth section, "the duty of that court does not involve an inquiry into the present amount of assets, but is limited to examining whether the claim appears to be justly due from the estate, and, if it does so appear, ordering sufficient assets to be retained, or a sufficient bond to be given, for the payment or satisfaction of the claim if subsequently proved to be due in an action at law." Gray, C. J., in *Hammond* v. *Granger*, 131 Mass. 351, 353.

The case cannot be distinguished from *Pratt* v. *Lamson*, *ubi supra*, in any respect material to the questions involved in the present inquiry, and it must therefore follow that case.

*Judgment for the defendant affirmed.*

---

## STEPHEN STANLEY & others *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. January 19, 1900. — May 18, 1900.

Present: MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Order of County Commissioners — Decree of this Court — Crossing of Streets by Railroad — Statute — Contempt.*

At the trial of a petition by the selectmen of a town asking for an order to show why the defendant railroad should not be adjudged guilty of a contempt for failing to comply with an order of the county commissioners, and a decree of this court, it appeared that the order decreed how the railroad should cross certain streets, and further provided as to raising and carrying B. Street over the



Digitized by Google

railroad but made no reference to C. Street, from the northerly line of whose westerly terminus a portion of B. Street was originally laid out. The railroad did not touch C. Street, or go over or under it. The decree of this court ordered the defendant to comply with the order of the county commissioners "and to construct said bridge and such approaches thereto as may be necessary, according to the terms of said order." The bill in equity in which the decree of this court was rendered sought merely to have the order of the county commissioners enforced; the evidence showed that the order was fully complied with when the present proceedings were begun, and the petitioner's counsel admitted that the order had been literally complied with. He relied, however, upon the language of Pub. Sts. c. 112, § 120, as to a railroad passing over or under a highway. *Held*, that this section should be read in connection with §§ 135 and 136 of the same chapter; that the basis of the action of the court was a decree of the county commissioners; that the decree was specific and definite; and that the order of the single justice in adjudging the respondent in contempt as to B. Street was erroneous, and in adjudging it not in contempt as to the non-construction of the approaches from C. Street was correct.

PETITION, by the selectmen of North Attleborough, filed April 11, 1899, praying that the respondent be held to answer for contempt. Hearing before *Morton*, J., who entered a decree with which both parties were dissatisfied, and at their request and before entry of the same reported the case for the consideration of the full court. The nature of the decree and the facts appear in the opinion.

*W. H. Fox*, for the petitioners.

*J. H. Benton, Jr.*, for the respondent.

LATHROP, J. Before 1887, no part of Broadway in North Attleborough had been laid out as a public way. On March 12, 1887, as the petitioners in their brief say, "evidently in anticipation of the coming of the railroad across it," the town laid out a portion of Broadway, beginning at the northerly line of the westerly terminus of Barrows Street, and running south 357.28 feet. Barrows Street ran east and west, and did not cross Broadway, which ran north and south.

In February, 1889, the selectmen agreed with the directors of the railroad company upon the route of the proposed railroad. This crossed Broadway diagonally but did not touch Barrows Street. In April, 1889, the county commissioners, upon a petition of the railroad company, alleging that they had agreed with the selectmen upon the route of the railroad which crossed "West, High, and Washington Streets," and asking the county commissioners to determine the manner in which the railroad

Digitized by Google

should cross said streets and any other highways or ways in said county, made a decree as to the three streets named, and further provided: "Broadway is to be raised and carried over the railroad at a grade of six feet in one hundred feet by a bridge eighteen feet above the railroad track forty feet wide, a roadway twenty-three feet wide and sidewalks on each side thereof six feet wide." No other reference was made to Broadway, and no order was made in respect to changing the grade of, or in any way altering, Barrows Street or any intersecting street.

The railroad company contended, at the time of this decree of the commissioners, and subsequently thereto, that Broadway was not a duly laid out public highway, and constructed its railroad without reference to the alleged existence of Broadway, so that, as constructed, the railroad crossed the alleged location of Broadway at grade.

In this state of things, on September 6, 1892, the selectmen of North Attleborough filed a bill in equity praying that the railroad company build its road over Broadway conformably with the decree of the county commissioners, and to cross the highway in the manner provided therein.

The case was sent to a master, who made a report, and was then heard by a single justice of this court on the master's report and exceptions thereto. A decree was entered which adjudged Broadway to be a legal public way, recited the order of the county commissioners, and ordered the defendant to comply with it, "and to construct said bridge and such approaches thereto as may be necessary, according to the terms of said order or decree of the county commissioners." This decree was made on March 9, 1894. An appeal was taken to the full court, but the decree was affirmed by consent on November 22, 1894.

The present proceeding is a petition of the selectmen of North Attleborough, alleging that the defendant has failed to comply with the order of the county commissioners, and the decree of this court of March 9, 1894, and asking for an order to show cause why the defendant should not be adjudged guilty of contempt.

The case was heard by a single justice of this court upon an agreed statement of facts, which set forth in substance the pre-

Digitized by Google

vious proceedings, and also the following: On April 22, 1893, an extension of Broadway, running north from Barrows Street to Church Street, a distance of 1,170 feet, was laid out as a public way by the town. Soon after the decree of March 9, 1894, the railroad company built a bridge over its railroad at the crossing of Broadway, the bridge and abutments being constructed as required by the decree of the county commissioners. Differences then arose between the defendant and the town authorities as to the obligation of the defendant to construct approaches beyond Broadway as it existed when the decree was made, and to grade Barrows Street to correspond therewith; the town contending that upon the extension of Broadway it was the duty of the railroad to extend the grade over the new portion of the way, and also to grade Barrows Street, as an intersecting street at the same grade; and the railroad company contending that it was not required to extend the grade beyond the limits of Broadway as it existed at the time the decree was made, and was not required to grade Barrows Street at all.

In 1898 the railroad company graded Broadway up to the bridge on the south side, substantially in accordance with the order of the county commissioners, and on the north side of the bridge it was filled in to the required height, and graded from the bridge to the northerly terminus of Broadway as it existed when the decree of the county commissioners was made. It has not graded any portion of Barrows Street as such.

The slope of earth as thus left is from twelve to fifteen feet high at the end, both northerly on Broadway and easterly on Barrows Street, and the approaches on the north side in this condition make the bridge and Broadway at that portion of its line impassable for public travel.

Until Broadway was extended, as above stated, in 1893, Barrows Street was the only outlet from its northern terminus.

At the former hearing in this cause and at the hearing before the master, the questions whether the defendant corporation was required to construct an approach to its bridge along Barrows Street, and to construct an approach to its bridge northerly along Broadway as now extended, were not considered, and no evidence was introduced in relation thereto.

On these facts, the single justice adjudged the defendant in

Digitized by Google

contempt because it had not completed the approaches to the bridge on Broadway as ordered by the decree of March 9, 1894, and ordered it to complete the approaches to said bridge within sixty days; and adjudged it not in contempt as to the non-construction of the approaches from Barrows Street. Both parties being dissatisfied, the case was reported for the consideration of the full court, before entering a decree.

We are of opinion that on the facts stated the petition should have been dismissed. The respondent was not guilty of contempt, unless it had violated the decree of a single justice of this court, entered on March 9, 1894. This ordered the defendant "to comply with said order or decree of the county commissioners, and to construct said bridge and such approaches thereto as may be necessary, according to the terms of said order or decree of the county commissioners." The bill in equity in which the decree of March 9, 1894, was rendered sought merely to have the order of the county commissioners enforced. The agreed facts and certain plans in evidence show that this order was fully complied with when the present proceedings were begun; and the petitioners' counsel admitted at the argument before us that the order had been literally complied with.

The petitioners, however, rely upon the language of the Pub. Sts. c. 112, § 120: "If the railroad is constructed to pass under the way, the railroad corporation shall build such bridges, with their abutments and suitable approaches thereto, as will accommodate the travel upon the way; but no bridge for any purpose shall be constructed over a railroad at a height less than eighteen feet above the track of such railroad, except by the consent in writing of the board. The Supreme Judicial Court may, by suitable process in equity, compel a compliance with the provisions of this section." The words "the board" refer to the board of county commissioners, mentioned in previous sections. The section just quoted must be read in connection with the other sections of the chapter. Section 135 of the same chapter provides: "Original jurisdiction of all questions touching obstruction to highways or town ways, caused by the construction or operation of railroads, shall be vested in the county commissioners within their respective jurisdictions." And § 136 provides: "The Supreme Judicial Court may by proceedings in

Digitized by Google

equity compel railroad corporations to raise or lower a highway or town way, when the county commissioners have decided that such raising or lowering is necessary for the security of the public, and to comply with the orders and decrees of county commissioners, in all cases touching obstructions to such ways by railroads."

It seem to us clear that the basis of the action of the court is a decree of the county commissioners. If they exceed their authority the court will not act. *Nichols* v. *Boston & Maine Railroad*, 174 Mass. 879, 883. If the order is not sufficiently specific the same result follows. *Roxbury* v. *Boston & Providence Railroad*, 2 Gray, 460. If the order is sufficiently specific then the court may enforce it, but no jurisdiction is given to change it. In the case before us the order is specific and definite; and it has been carried out. The order referred to Broadway as it then existed. The county commissioners had no power in respect to Broadway as it might exist in the future, and they did not assume to act in regard to it. The order of the single justice in the matter before us, in adjudging the respondent in contempt as to Broadway, was therefore erroneous.

As to Barrows Street, the contention is that it formed a single street with Broadway as then laid out. But Barrows Street was laid out some years before Broadway was; and when Broadway was laid out it was an independent street. The railroad does not touch Barrows Street, or go over or under it. The order of the county commissioners does not refer to it, nor does the decree of March 9, 1894. The ruling of the single justice of this court on this point was right.

*Petition dismissed.*

Digitized by Google

# NEW YORK BANK NOTE COMPANY *vs.* KIDDER PRESS MANUFACTURING COMPANY & another.

Suffolk. January 19, 1900. — May 18, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Receivers — Decree — Assent of Creditors — Preference.*

A creditor, at whose request receivers have been appointed to administer the assets of a corporation, and who, together with all other parties in interest, has assented to a decree directing the receivers of a corporation to carry on the business as a going concern, and out of the money then on hand or thereafter to be received to pay all outstanding commercial paper of the corporation as it should mature, together with all legitimate expenses, and who also has assented to a later decree directing a sale of the assets and the raising of a fund then in court, cannot justly compel the holders of the commercial paper and the receivers to await the ultimate determination of the amount of his claim pending in another jurisdiction, and, if it should be so large that all demands and expenses could not be paid in full, to have partial payment only.

BILL IN EQUITY, to restrain the foreclosure of a mortgage or trust deed executed by the first named defendant to Eugene A. Bascom, and praying for the appointment of a receiver of the first named defendant, and that the trust under the mortgage be executed by applying the proceeds of the property to the payment of the outstanding indebtedness of the first named defendant. Trial in the Superior Court, before *Braley*, J., who ordered a decree directing the receivers to pay a certain sum incurred by them in carrying on the business, certain promissory notes, and a certain sum for counsel fees, and reported the case for the determination of this court, such decree to be entered as justice might require. The facts appear in the opinion.

*E. P. Lyon*, (of New York,) for the plaintiff.

*V. J. Loring*, (*H. M. Aldrich* with him,) for the first named defendant.

BARKER, J. Pursuant to a prayer of the plaintiff the receivers were appointed on June 20, 1898. The decree defining their duties was assented to by all the parties to the cause, and the plaintiff alone now objects to the subsequent decree, ordering the receivers to make certain payments, and which is before us upon the report. By the decree of June 20, 1898, the receivers

Digitized by Google

were directed to carry on the business of a manufacturing company as a going concern, and out of the money then on hand or thereafter received to pay all its outstanding commercial paper as the same might mature, the company, however, to have liberty to renew from time to time all or any of such paper. Four notes of the company were then outstanding, which would mature after that date. None of them were renewed, and all of them had matured before the entry of the decree which is brought here by the report of January 4, 1900. That decree ordered the receivers to pay the four notes with accrued interest, and also to pay a sum of $1,613.10, owing by the receivers for supplies used by them in carrying on the business, and a further sum of $5,329.53, allowed them as fees paid counsel, that sum having been fixed by the report of the master, confirmed by the court after exceptions to it had been overruled.

The fund from which the receivers have been ordered to make these payments is made up of the proceeds of sales made by order of court. On September 20, 1897, the manufacturing company made a trust deed to the defendant Bascom, containing a power of sale. On January 19, 1899, a decree was entered by consent of all parties to the cause, and of all persons interested in the trust deed, directing Bascom and the receivers to sell all the property covered by the trust deed, and also any assets of the manufacturing company not so covered, the proceeds of the sales to be brought into court. A sale under the decree was made on March 1, 1899, and the proceeds, amounting to $72,062.83, were paid into court, and constitute the fund in question, less a sum of $500 which has been allowed to the receivers for expenses in certain litigation pending in Ohio. The report states that no separation of the amount received from the sale of property covered by the trust deed, and of the amount received from the sale of other assets, has been or can be made.

The plaintiff's demand is for damages, not yet liquidated, for breach by the manufacturing company of a contract made by it on October 12, 1891. The bill alleges that such breaches were committed in December, 1892, and in August, 1893, and that the manufacturing company owes the plaintiff for these damages a sum not less than $20,000; and also that, in a suit now pending in the courts of New York, in favor of the plaintiff against another

Digitized by Google

bank note company and the manufacturing company, it was adjudged on June 8, 1898, that the plaintiff should recover from the manufacturing company the damages which the plaintiff had sustained by the breaches of the contract alleged in the bill in this action; and that the New York action was thereupon sent to a referee to determine the amount of such damages, and is yet pending. The bill also alleges that the trust deed of September 20, 1897, was made for the principal purpose of cheating the plaintiff out of its said claim for damages by doing away with the assets of the manufacturing company, so as to defeat the collection of any judgment which the plaintiff may recover in the New York action.

A cross bill was filed by the manufacturing company on July 13, 1898, and answers to the original bill were filed by that company and by the trustee Bascom on July 20, 1898. The answer of the plaintiff in the original bill to the cross bill was filed on October 13, 1898. The general result of these pleadings is that the right of the plaintiff in the original bill to recover any damages of the manufacturing company is denied. In this state of the pleadings, the decree of June 20, 1898, appointing the receivers and defining their duties and powers standing unmodified, the decree of January 19, 1899, directing the sale of all the assets of the manufacturing company, was entered by consent of the plaintiff, and the order directing the payment by the receivers out of the fund raised by the sale, of the sums together amounting to about $26,000, was made.

In dealing with the question whether these payments were rightly ordered, we assume in favor of the plaintiff, without so deciding, that its right to have damages from the manufacturing company has been fixed by the alleged judgment of June 8, 1898, in the New York court, and that such damages are so large that if the payments ordered shall be made the balance of the fund in court will be insufficient to pay the plaintiff's damages; and also that the trust deed in providing that the trustee, should hold the property conveyed by it "to pay all and every the existing indebtedness or liabilities of the" manufacturing company applied as well to the plaintiff's demand for damages as to other debts or liabilities, so that the commercial paper of the company would have no preference in the administration of the trust fund.

Digitized by Google

These assumptions being made in favor of the plaintiff, the answer to its contention that neither the commercial paper of the manufacturing company which was outstanding on June 20, 1898, the expenses incurred by the receivers in carrying on the business, nor those incurred by them for counsel fees in discharging their duties as receivers, shall now be paid out of the fund in court is this. When the plaintiff asked the court to appoint receivers to take possession of all the assets of the manufacturing company, and to administer and wind up the same, it was met by an immediate and complete denial of any right on its part to share in those assets. In this position of affairs the plaintiff saw fit to consent to a decree appointing the receivers, directing them to carry on the business as a going concern, and out of the money then on hand or thereafter to be received to pay all outstanding commercial paper of the manufacturing company as it should mature unless renewed. No one contested the right of the holders of such paper to payment. Those holders were in a position to contest the appointment of receivers. The bill did not allege that there was a deficiency of assets to discharge in full all the liabilities of the manufacturing company. In consenting to the decree of June 20, 1898, the plaintiff must be taken to have consented, as one of the terms upon which receivers would be appointed, that the commercial paper of the manufacturing company then outstanding should be paid, as it matured, by the receivers out of any money which should come to their hands, and also that they should be reimbursed for all their legitimate expenses as receivers. There has been no modification of that decree, and the plaintiff has also consented to the decree of January 19, 1899, directing the sale and the raising of the fund now in court. It cannot be assumed that either of those decrees would have been assented to by the other parties interested, or would have been entered by the court, but for the consent of the plaintiff to the payment of the outstanding commercial paper as it should mature, and of the expenses of the receivers, out of the fund, and without waiting the ultimate determination of the amount of the plaintiff's claim. Under these circumstances it would now be unjust to compel the holders of the commercial paper of the manufacturing company and the receivers to await the ultimate determination of the amount

Digitized by Google

of the plaintiff's claim, and if it shall be so large that all demands and expenses cannot be paid in full, to have but partial payment only.

The plaintiff sought to have the assets of its debtor administered upon the footing that the commercial paper of the debtor and the expenses of administration should be met in full. It cannot now be allowed to change that footing and thereby to compel those who have assented to its scheme for its own relief to wait longer, or to run the chance of receiving less than their due. *Decree of the Superior Court affirmed.*

---

GEORGE W. PROUTY & another *vs.* UNION HARDWARE COMPANY.

Suffolk. March 7, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Construction of Contract.*

A., who was the holder of a patent, gave B. by contract in writing an exclusive license to manufacture and sell articles under the patent for its full term, except as thereinafter provided. B. agreed, among other things, to pay A. $500, to manufacture and sell articles under the patent and to pay certain royalties. Then came this clause, "The party of the second part (B.) further agrees that, if in any year the royalty above referred to shall not amount to the sum of five hundred dollars, then it will either pay to the said party of the first part (A.), within sixty days of the termination of the year, the sum of five hundred dollars, as liquidated royalty, or will submit to the cancellation of this license at the option of the party of the first part." *Held*, in an action by A. against B. to recover $500 as liquidated royalty, that the contract gave the choice to B. whether he would pay or submit to a cancellation.

CONTRACT to recover $500, as liquidated royalty, under a written contract dated March 1, 1898. Trial in the Superior Court, before *Hardy*, J., who excluded from evidence certain letters written before the execution of the contract and all other testimony offered by either side for the purpose of removing or explaining any supposed ambiguities in the contract, found that, if the excluded evidence were admissible, it confirmed the construction of the contract contended for by the

Digitized by Google

defendant and found for the defendant. The judge reported the case for the determination of this court. If the finding was right, judgment was to be entered for the defendant; if wrong, judgment was to be entered for the plaintiffs in the sum of $500 with interest. The facts appear in the opinion.

*M. Storey*, (*F. Rogers* with him,) for the plaintiffs.

*W. F. Dana*, (*J. P. Parmenter* with him,) for the defendant.

HOLMES, C. J. This is an action to recover the sum of $500 alleged to be due under a written contract between the parties. The sum is due if the plaintiffs' construction of the contract is correct, but the judge before whom the case was tried did not adopt that construction, and found for the defendant.

The plaintiffs were holders of a patent relating to skates, and by the contract in question gave the defendant an exclusive license to manufacture and sell skates under the patent for the term of the patent except as thereinafter provided. The defendant agreed, among other things, to pay the plaintiffs $500, to manufacture and sell skates under the patent and to pay certain royalties. Then came the clause on which the question arises. It is as follows: "3d. The party of the second part further agrees that, if in any year the royalty above referred to shall not amount to the sum of five hundred dollars ($500), then it will either pay to the said party of the first part, within sixty days of the termination of the year, the sum of five hundred dollars ($500), as liquidated royalty, or will submit to the cancellation of this license at the option of the party of the first part."

The plaintiffs' contention is that these words in terms give them the option to demand the money or to cancel the license. Undoubtedly their construction is the first to occur to the mind on reading the words. The option naturally is referred to the only matter which is stated expressly as a matter of choice, namely, the alternative "either" to pay "or" to submit to a cancellation of the license. On the other hand the defendant's construction is possible consistently with the ordinary usages of language hereabouts. This construction is that the words "at the option," etc., qualify "cancellation." A covenant to submit to cancellation at the option of the covenantee is perfectly

Digitized by Google

intelligible, and none the less so when it is an alternative covenant.

The plaintiffs argue not only that theirs is the most natural construction, and fortified by the consideration that the defendant drew the instrument and is the covenantor in the clause in question, whatever grounds those facts may furnish for reading the words adversely to it, but also that the situation of the parties shows that the plaintiffs' reading is required by justice. If the other interpretation is adopted, they say, then, if the defendant, a manufacturer of many kinds of skates, either from a sinister motive or from indifference, did not see fit to push the plaintiffs' invention, the contract left them with no remedy but to take it back, discredited, for disposition elsewhere, which might be just what the defendant would like. Contracts like that which the plaintiffs say they have made seem to be known to trade. *Preston* v. *Smith*, 156 Ill. 359.

The argument on the other side seems to us stronger. It is to be assumed that the defendant was and was supposed to be honest when it made the arrangement. It could not tell in advance what would be the success of the invention, and naturally would not take the risk to the extent of covenanting to pay a considerable sum during the whole term of the patent. If after a fair effort to put the invention on the market it realized less than $500 a year in royalties, the most that the patentees could ask would be a choice between accepting the royalties earned or going elsewhere for another trial. The defendant risked all that could be expected when it went to the expense of making a preliminary payment to the plaintiff and of giving the invention a chance to succeed. On the other hand, having gone so far without return, it was reasonable that it should be given the right to keep its license on fair terms. This would be secured by allowing it the choice of paying a sum satisfactory to the other side; and if the plaintiffs received from the defendant a sum equal to the minimum amount of royalties mentioned, it is not reasonable to suppose that they were to be at liberty to end the license if by an accident $10 of the amount did not represent royalties actually earned but were made up by the defendant. It may be added for what it is worth that the structure of the sentence imports that the

Digitized by Google

primary activity is the defendant's. The sentence does not empower the plaintiffs to demand money or end the license, it binds the defendant to pay or to submit to a cancellation. It is to be noted in this connection that there is no comma after "license." *Joy* v. *St. Louis*, 138 U. S. 1, 32.

A contract very like the one before us was passed upon and construed in the same way in *Wing* v. *Ansonia Clock Co.* 102 N. Y. 531.

As we are of opinion that the defendant's construction of the contract is correct without the aid of the preliminary correspondence, it is unnecessary to consider whether the letters were admissible. The nearest cases which we have seen are *Stoops* v. *Smith*, 100 Mass. 63, 65, 66. *Bank of New Zealand* v. *Simpson*, 82 L. T. (N. S.) 102. *Bruce* v. *Moon*, 57 S. C. 60, 68, 69. We express no opinion whether they are sufficient to warrant the admission of the evidence.

If the choice lay with the defendant, it must be taken to have indicated sufficiently that it did not intend to pay the $500, and that it did submit to a cancellation of the license at the option of the plaintiffs. *Judgment for the defendant.*

---

## J. H. SILSBY & others *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Suffolk. March 8, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Conditional Sale — Delivery — Title — Waiver — Custom — Usage — Carrier.*

If, in an action of replevin against a carrier, it appears that the sale of the merchandise was conditioned on the sending of a note by the buyer to the seller, the question whether there was a waiver of the condition is a question of fact; and the fact that it was not the custom to send the note until after the buyer should verify the quality and count of the merchandise as compared with his order is immaterial, a delivery to the buyer not necessarily being a waiver of the condition, and it making no difference that the buyer could, to a certain extent, suit his own convenience in removing the merchandise from the custody of the carrier; and a usage for the buyer to sell directly from the warehouse, subject to the carrier's lien for charges, does not go far enough, it not appearing that a buyer may sell and pass a good title without acquiring a good title himself.

Digitized by Google

REPLEVIN of a car load of lumber. At the trial in the Superior Court, without a jury, before *Hardy*, J., it appeared that just before March 26, 1898, the plaintiffs sold the lumber in question, through their selling agent in Boston, to one Paul in that city, payment to be made by a three months' note, to be sent to the plaintiffs after Paul had received the lumber, and to be dated as of date of invoice and to include a month's interest; that on March 28 the lumber was shipped, by order of the plaintiffs, from North Tonawanda, New York, and consigned to the plaintiffs at Boston; that on March 29 the plaintiffs sent word to the defendant to deliver the lumber "consigned to us" to Paul, and on March 31 the lumber having arrived in Boston the defendant sent word to Paul; that on April 8 the defendant sent word to Paul that it had stored the lumber in a designated place; that on April 9 Paul made an assignment for the benefit of his creditors; that later the plaintiffs demanded the lumber of the defendant; and, the defendant having refused to deliver it, brought this action of replevin.

It appeared that it was the custom in the lumber trade not to send the note until after the buyer should verify the quality and count of the lumber as compared with his order, and that the buyer could, to a certain extent, suit his own convenience in removing the lumber from the custody of the carrier; and it appeared that there was also a usage for the buyer to sell directly from the railroad subject to the company's lien for charges.

The defendant asked for twenty-three instructions, most of which were given. The eleventh request, which was as follows, was refused: "It cannot be ruled as matter of law, upon all the evidence in the case, that the giving of a note by the vendee to the plaintiffs was a condition precedent to the passing of the title to the replevied lumber." The court found for the plaintiffs; and the defendant alleged exceptions.

*F. Paul*, for the defendant.

*W. Mooers*, for the plaintiffs.

LATHROP, J. We do not find anything in the facts set forth in the bill of exceptions to take the case out of the general rule that the sale was conditioned on the sending of a note by the buyer to the seller; and that whether there was a waiver of the

Digitized by Google

condition was a question of fact. *Whitwell* v. *Vincent*, 4 Pick. 449. *Hill* v. *Freeman*, 3 Cush. 257. *Whitney* v. *Eaton*, 15 Gray, 225. *Farlow* v. *Ellis*, 15 Gray, 229. *Hirschorn* v. *Canney*, 98 Mass. 149. *Adams* v. *O'Connor*, 100 Mass. 515. *Nelson* v. *Dodge*, 116 Mass. 367. *Armour* v. *Pecker*, 123 Mass. 143. *Salomon* v. *Hathaway*, 126 Mass. 452. *Brownville Maine Slate Co.* v. *Hill*, 175 Mass. 532.

So far as the custom in the trade is concerned, the fact that it was not the custom to send the note until after the buyer should verify the quality and count of the lumber as compared with his order is immaterial. The defendant argued that this necessitates the unloading of the car; but a delivery to the buyer would not necessarily be a waiver of the condition, as is held in many of the cases above cited. Nor can the fact that the buyer could, to a certain extent, suit his own convenience in removing the lumber from the custody of the carrier or the warehouseman make any difference. The lumber still remained the property of the sellers. As to the usage for the buyer to sell directly from the railroad subject to the company's lien for charges, this is to be said, that the usage does not go far enough. It does not appear that a buyer of lumber may sell and pass a good title without acquiring a good title himself, and this in the present case Paul did not have. Moreover, it may be said that the controversy in this case is not between the plaintiffs and a purchaser for value, but between the plaintiffs and a person who has no more rights than Paul had. See *Whitney* v. *Eaton*, 15 Gray, 225, 226.

The defendant asked for twenty-three instructions. Most of these were given. The eleventh request, on the authority of the cases above cited, was properly refused. We see nothing in the other requests for instructions which were refused which requires further discussion.

*Exceptions overruled.*

Digitized by Google

CHARLES M. BRUCE, assignee, *vs.* CARL P. ANDERSON & another.

Middlesex. March 8, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Judgment — Attorney's Lien — Exceptions.*

At the trial of an action brought by an assignee in insolvency upon a judgment recovered by the insolvent, it appeared that the first publication of notice was on June 8, 1898; and that two days later the insolvent's attorney, who had had charge of the case in which the judgment was recovered, took out a third execution for the amount remaining unpaid, namely, $293.77, and the next day collected $200, agreeing to receive that sum in full satisfaction, and surrendering the execution to the defendant. The jury were instructed that they should allow the defendant the fees and disbursements of the attorney in the former case, which the jury fixed at $50, but that they should not allow the residue of the payment, as the defendant had no right to settle with the attorney after June 8. The defendant did not contest his liability for the amount of the execution in excess of the settlement, but excepted to the refusal to allow him the full amount paid. *Held*, that the instruction was correct.

CONTRACT, upon a judgment recovered on July 9, 1897, in the First District Court of Eastern Middlesex, by James Henderson and John D. Henderson, copartners doing business under the firm name of Henderson Brothers, against the defendants in the present action, for $631.39 damage, and $12.38 costs of suit, making $643.77. At the trial in the Superior Court, before *Blodgett*, J., the jury returned a verdict for the plaintiff in the sum of $240.46, crediting the defendants with a payment of $50 to one Roberts, attorney for the plaintiffs in the former case, and another payment made to the original plaintiffs of $22, and not allowing the remainder of the payment of $200. The defendants alleged exceptions, which appear in the opinion.

*D. P. Bailey*, for the defendants.

*C. O. Engstrom*, for the plaintiff.

HOLMES, C. J. This is an action brought by an assignee in insolvency upon a judgment recovered by the insolvent. The first publication of notice was on June 8, 1898. On June 10, 1898, the insolvent's attorney, who had had charge of the case in which the judgment was recovered, took out a third execution



Digitized by Google

for the amount remaining unpaid, namely, $293.77, and the next day collected $200, agreeing to receive that sum in full satisfaction, and surrendering the execution to the defendants. At the trial of the present action the jury were instructed that they should allow the defendants the fees and disbursements of the attorney in the former case, (which the jury fixed at $50,) but that they should not allow the residue of the payment, as the defendants had no right to settle with the attorney after June 8. The defendants do not contest their liability for the amount of the execution in excess of the settlement, but they are here on exceptions to the refusal to allow them the full amount paid.

As it is agreed that the settlement was not binding, it is not necessary to spend time upon that. *Wilson* v. *Hatfield*, 121 Mass. 551. *Weber* v. *Couch*, 134 Mass. 26. A question might be raised, however, whether, if the assignee repudiated it, he is not bound to restore the money which the defendants paid in pursuance of it. *Drohan* v. *Lake Shore & Michigan Southern Railway*, 162 Mass. 435. *Moore* v. *Massachusetts Benefit Association*, 165 Mass. 517. See *Trecy* v. *Jefts*, 149 Mass. 211, 212. But the exceptions were not intended to raise the question, and it was not argued. Probably the answer would be that, as the amount was indisputably due and was admitted to be due, the payment was to be referred to the judgment and not to the settlement avoided. *Cobb* v. *Tirrell*, 137 Mass. 143, 146. *Cobb* v. *Fogg*, 166 Mass. 466, 479.

Apart from the lien of the attorney under Pub. Sts. c. 159, § 42, the payment by the defendants would be invalid as against the plaintiff. *Butler* v. *Mullen*, 100 Mass. 453. But of course the lien was not defeated by the insolvency. So the inquiry is narrowed to whether the attorney, notwithstanding the insolvency, had a right to collect more than the amount of his lien. This question must be decided in the same way in which it would have been decided if the defendants had known of the insolvency and had paid the attorney against the protest of the assignee. See Pub. Sts. c. 157, §§ 17, 46. *Edwards* v. *Sumner*, 4 Cush. 393. The question is as to the attorney's technical rights.

We are of opinion that the attorney had not the right to collect more than the amount of his lien, and that the ruling

Digitized by Google

of the court below was correct. Although the lien is statutory, it is reasonable to suppose that the statute in adopting the familiar terms meant also to adopt the doctrine of the English law. It is true, no doubt, that the lien is upon the whole sum recovered, (*Baker* v. *Cook*, 11 Mass. 236, 238,) and that when a judgment is for costs only, the whole amount may be due to the attorney. *Woods* v. *Verry*, 4 Gray, 357, 359. See *Horton* v. *Champlin*, 12 R. I. 550. It is true that the attorney has been spoken of in some cases as standing like one to whom the judgment has been assigned as collateral security. *Martin* v. *Hawks*, 15 Johns. 405. *McDonald* v. *Napier*, 14 Ga. 89, 111. *Newbert* v. *Cunningham*, 50 Maine, 231, 233. Yet even in New York that expression has been criticised, and it would seem that after an assignment for the benefit of creditors the attorney could not collect the judgment generally, or do more than is necessary to enforce his lien. *Merchant* v. *Sessions*, 5 N. Y. Civ. Proc. Rep. 24, 26. *Adams* v. *Fox*, 40 Barb. 442, 446, 447. In *Adams* v. *Fox*, as in other American cases, the doctrine of the English decisions is accepted without dissent.

According to the English decisions the attorney's lien "is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt." But the attorney is not the *dominus litis*, and in the case from which the foregoing words were taken it was held, and said by Baron Parke to be perfectly clear, that the attorney had no right to carry the execution into effect against the order of the plaintiff, although the plaintiff and defendant had colluded together to defeat the lien. *Barker* v. *St. Quintin*, 12 M. & W. 441, 451. *Brunsdon* v. *Allard*, 2 El. & El. 19. *Mercer* v. *Graves*, L. R. 7 Q. B. 499. *Horton* v. *Champlin*, 12 R. I. 550. Although the decision in *Barker* v. *St. Quintin* may be inconsistent with *Newbert* v. *Cunningham*, 50 Maine, 231, these cases are enough to establish that the attorney does not stand in the technical position of an assignee of the judgment; and unless he does stand in that position his right to collect more than is necessary to give him his fees and disbursements falls. We do not know of any decision opposed to that which we make, although the reasoning in *Newbert* v. *Cunningham* and some of the New York cases tends somewhat the other way. *Exceptions overruled.*

Digitized by Google

HENRY G. BURRELL & another *vs.* WILLIAM T. WAY & another.

ELLERY P. CLAPP *vs.* SAME.

Norfolk. March 9, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Mechanic's Lien — Amendment of Petition — Time of filing Petition — Work colorably performed.*

A petitioner to enforce a lien on buildings and land whose statement, filed in the registry of deeds, and whose petition both recited that he ceased to perform labor and furnish materials on September 13, may, after his petition has been so amended as to include labor and materials furnished on September 15, be allowed to testify that the recital in the statement was a mistake, and that he furnished labor and materials on September 15.

At the trial of a petition to enforce a lien on buildings and land, in which the petitioner testified that he charged the respondent $6 per day for the labor of a plumber and his assistant to whom he was paying $2.83½ per day, and that such charge was the regular market price for such labor and was agreed to by the respondent, a request by the respondent to instruct the jury that such charge was sufficient to warrant a finding that the petitioner had wilfully and knowingly claimed more than was due him was properly refused.

At the trial of a petition to enforce a lien on buildings and land, it appeared that the last material furnished by the petitioner, except certain piazza columns, was furnished September 30; that it did not appear that any time was fixed by the contract within which the columns were to be delivered, and their delivery was delayed by him until October 23 for the purpose of extending and preserving his lien; and that he filed his certificate of lien on October 29. *Held*, that the judge was not bound as matter of law to rule that the delivery of the columns on October 23 did not extend the time within which the statement must be filed.

If a petition to enforce a lien on buildings and land, filed December 18, and the statement, filed in the registry of deeds, both recite that the petitioner ceased to furnish labor and materials on September 13, it is too late, after the allowance of an amendment of the petitioner, so as to include labor and materials furnished on September 15, to raise the question that the petition was not seasonably filed.

TWO PETITIONS to enforce liens on buildings and land under Pub. Sts. c. 191. At the trial in the Superior Court, before *Bell*, J., the jury returned a verdict for the petitioner in each case, and the respondents alleged exceptions. The material facts appear in the opinion.

*J. W. Keith*, for the respondents.

*O. A. Marden*, for the petitioners.

Digitized by Google

LATHROP, J. These are two petitions to enforce liens on buildings and land, under the Pub. Sts. c. 191. In the Superior Court verdicts were returned for the petitioners, and the respondents alleged exceptions. So far as these are open and were insisted upon at the argument we proceed to consider them.

1. In his statement of lien filed in the registry of deeds on October 13, 1897, Burrell stated that he ceased to perform and furnish labor and materials on September 13, 1897. His petition was filed in the Superior Court on December 13, 1897, and recited that he ceased to perform and furnish labor and materials on September 13, 1897. On January 5, 1899, by leave of court, his petition was allowed to be amended so as to include labor furnished to and including September 15, 1897. The first exception is to the judge allowing Burrell to testify that the recital in the statement was a mistake, and that he furnished materials and labor on September 15, 1897.

There can be no question of the power of the judge to allow the petitioner to amend his petition, for this is expressly given by the Pub. Sts. c. 191, § 20. The respondents however contend that there is nothing in the statutes which allows the statement of lien to be amended. This contention is correct, but the respondents have overlooked the fact that § 6 of this chapter does not in terms require that the statement should contain any averment as to the time when the petitioner ceased to furnish labor or materials. It does require that the lien shall be dissolved unless the statement is filed in the registry of deeds, within thirty days after the person seeking to avail himself thereof ceases to labor on or furnish labor or materials for the building. *Brosnan* v. *Trulson*, 164 Mass. 410. Moreover, this section is amended by the St. of 1892, c. 191, by adding the words, "But no statement required by this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating or failing to state the contract price, the number of days of labor performed or furnished, and the value of the same: provided, it is shown that there was no intention to mislead, and that the parties entitled to notice of the statement were not in fact misled thereby." See *Monaghan* v. *Goddard*, 173 Mass. 468.

2. The next question is whether the court should have in-

Digitized by Google

structed the jury as requested by the respondents: "That the claim of the petitioner to charge $6 per day for what he was paying $2.83⅓ per day is evidence sufficient, if believed by the jury, to warrant a finding that the petitioner has wilfully and knowingly claimed more than was due him." But this was not all the evidence on the subject. The exceptions state: "The petitioner testified and introduced evidence tending to show that the two men for whose labor these prices were charged were a plumber and pipe fitter and his assistant, and that the price so charged was the regular market price charged for such labor, and that the price so charged was agreed to by himself and the respondent's agent, Leighton."

We are of opinion that the judge was right in refusing to give the instruction requested, and in leaving the question to the jury on all the evidence. *Borden* v. *Mercer*, 163 Mass. 7. See *Walls* v. *Ducharme*, 162 Mass. 432.

3. Clapp testified that he retained four piazza columns in his yard for two or three weeks, after he delivered all the other material, until October 23, 1897, "with the idea and purpose among other things to extend and preserve his lien." It did not appear that there was any time fixed by the contract within which it was the duty of Clapp to furnish the piazza columns. The last material furnished by him before the piazza columns was on September 30, 1897, and he filed his statement on October 29, 1897.

We are of opinion that the judge was not bound to rule, as matter of law, that the delivery of the four cedar columns on October 23, 1897, did not extend the time within which the statement must be filed. *Monaghan* v. *Putney*, 161 Mass. 338. *Miller* v. *Wilkinson*, 167 Mass. 136. *Monaghan* v. *Goddard*, 173 Mass. 468.

4. Lastly, the respondents contend that neither petition was filed in the Superior Court in season. No such question was raised in the court below in regard to the petition of Clapp, and no request for such a ruling was made. In the case of Burrell such a request was made, and we proceed to consider it.

It is provided by the Pub. Sts. c. 191, § 9: "Unless a suit for enforcing the lien is commenced within ninety days after the person desiring to avail himself thereof ceases to labor on or to

Digitized by Google

furnish labor or materials for the building or structure, the lien shall be dissolved." See *Davis* v. *Arthur*, 170 Mass. 449. The argument of the respondent is that as the petition was filed on December 13, 1897, it was filed one day too late, because the statement filed in the registry of deeds and his petition set forth that he ceased to labor and furnish materials on September 13. But, as we have already seen, the petition was allowed to be amended to include labor furnished to and including September 15, 1897. As we have held that the court below had power to allow this amendment, it was too late, after the amendment was allowed, and evidence was admitted to sustain the amendment, to raise the question that the petition was not seasonably filed.

*Exceptions overruled.*

---

H. WILBUR DUDLEY & others *vs.* INHABITANTS OF MILTON.

Norfolk. March 9, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Devise of Premises on both Sides of Country Road.*

In view of the history of the occupation of premises consisting of a lot with a barn on one side of a country road and a house just opposite on the other, a devise to A. of "the house in which he now lives, situated on B. Road, M., subject to a mortgage," etc., is construed to embrace the barn lot.

PETITION to the Superior Court for a jury to assess damages for the taking of land by the respondent, for the widening of Brook Road in Milton. Trial in the Superior Court, before *Richardson*, J., who reported the case for the consideration of this court upon a certain ruling stated in the opinion; and the petitioners alleged exceptions. If the ruling was right, judgment was to be entered for the petitioners for $1,765.82; otherwise for $2,472.06 and interest.

*G. H. Russ*, for the petitioners.

*J. D. Colt*, (*J. R. Dunbar* with him,) for the respondent.

HOLMES, C. J. This is a petition for the assessment of damages caused by the taking of land for the widening of a

Digitized by Google

road in Milton. Land was taken on one side of the road from a lot upon which stood the petitioners' house, and on the opposite side from a lot upon which was a barn. At the trial the judge ruled that the petitioners had failed to prove their title to the last mentioned parcel, and could not recover any damages for the taking. The petitioners excepted. The history of the title was this: In September, 1880, both lots were conveyed to Mary S. Dudley, under whom the petitioners claim. Two years later they were mortgaged by her to a savings bank for $1,600. In August, 1883, they were sold upon execution for less than $100 to one Bosson, who, in February, 1884, conveyed them to Susan A. Twombley, Mary S. Dudley's mother. A month or so later, on March 15, 1884, Mrs. Twombley made her will, and by it she devised to her daughter Mary "the house in which she now lives, situated on Brook Road, Milton, and subject to a mortgage of sixteen hundred dollars and interest," etc. Mrs. Twombley died in the same year, and her will was proved on September 17, 1884. Mary S. Dudley is dead. The petitioners are her husband and children.

The husband testified that he was living upon the property when he bought it; that he moved on it in April and bought in September. This testimony clearly means that he was living upon the whole of the property which was bought in September, 1880. He added that he built the walls on both sides of the street, that he was in business there, and set his walls back to give him more room. This again shows that he was occupying both sides of the road, exercising dominion over both parcels, carrying on business upon them, and adjusting the walls upon them to suit his convenience. He further testified that he was living upon the property now, and had lived upon it all the time. The expression "the property" is used throughout his testimony to signify the whole purchase. We must take it, therefore, that the petitioners are seised of both parcels in question, and have occupied them, undisturbed, so far as appears, since Mrs. Twombley's death. Probably the petitioners were surprised by the request upon which the ruling excepted to was made, or they would have brought out their seisin more distinctly; but as the evidence stands it can mean but one thing.

In view of the history of the premises we are of opinion that

Digitized by Google

the evidence shows that the second parcel is embraced in the devise to the petitioners. It was a lot with a barn, just opposite the house, and it would not be a violent conjecture to presume that the barn was built for occupation, as it was occupied, in connection with the house, according to a common New England habit. The two lots were small. The one in question was little more than a barn lot. The words "the house in which she now lives" are capable of a meaning wide enough to include barn as well as house. "An acre or more may pass by the name of a house." Co. Lit. 5 b. The reference to the occupation, the size and character of the lots, and the fact that they had been bought and kept together, all point to our construction. And this construction is slightly confirmed by the introduction of the reference to the mortgage by the word "and"; ("situated on Brook Road, Milton, and subject to a mortgage.") The "and" suggests that the description is still continuing, and that the mortgage is mentioned for further identification of the land. The mortgage covered both lots.

The question is not what would be a sufficient description in an indictment or a sheriff's return, but what is the meaning of certain words according to the popular habits of New England speech. From that point of view we have not much doubt as to how we should read the will. See *Bridge* v. *Bridge*, 146 Mass. 373, 377; *Backus* v. *Chapman*, 111 Mass. 386, 387; *Melcher* v. *Chase*, 105 Mass. 125; *Aldrich* v. *Gaskill*, 10 Cush. 155, 158; *Doe* v. *Collins*, 2 T. R. 498.

*Judgment for* $2,472.06 *and interest.*

Digitized by Google

# ROGER F. SCANNELL *vs.* BOSTON ELEVATED RAILWAY COMPANY.

# MICHAEL P. SHEA *vs.* SAME.

Suffolk. March 15, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Personal Injuries — Assumption of Risk — Instructions — Evidence — Care of Reasonably Prudent Person — Credibility of Witness — Conviction of Witness under Statute afterwards declared Unconstitutional.*

At the trial of an action for personal injuries occasioned to the plaintiff by a collision of the wagon in which he was riding and an electric car of the defendant at the junction of C. and N. streets, the defendant requested a ruling that if the plaintiff attempted to hurry across the street in front of a rapidly approaching electric car he assumed the risk of collision. In support of this request the defendant contended that the plaintiff was aware, before he turned to cross the tracks, that the car was approaching and that it was running very fast. Reference was made to the plaintiff's testimony on cross-examination that, when he started to turn, the car was "just west of the corner of A. Street; that he did not know whether it had stopped at the corner or not; that he should judge it was moving; that he could not say how fast it was then going; that when the car was about at D.'s liquor store it was going very fast; and that the seat on which he was sitting was then over the space between the two lines of track." The distance between A. Street and N. Street was one hundred and ninety-eight feet, and the liquor store was about opposite S. Place, which was about half way between A. Street and N. Street. There was nothing to impede the view of both the motorman and the plaintiff as they approached each other. *Held*, that the theory of the defendant was not supported by the evidence.

If, in an action for personal injuries occasioned to the plaintiff by a collision of the wagon in which he was riding and an electric car of the defendant, the judge instructs the jury that the care required of the plaintiff or the defendant is that care which a reasonably prudent person would exercise under like circumstances, and the situation is clearly pointed out to the jury, a request by the defendant for a ruling that the driver of a wagon on a street where electric cars run must use more care than when he drives on a street where they do not run, is rightly refused.

To affect the credibility of a witness under Pub. Sts. c. 169, § 19, the defendant was allowed, against the objection of the plaintiff, to put in evidence the record of the conviction of the witness in the Circuit Court of the United States, in 1878, for fraudulently violating a registered trade-mark. The next day the attention of the court was called to the fact that shortly after the conviction the statute was declared to be unconstitutional. The judge instructed the jury that the effect of the conviction was for them, and that the fact that the statute had been declared unconstitutional could be taken into consideration. *Held*, that the defendant had no ground of exception.

Digitized by Google

TWO ACTIONS OF TORT for personal injuries occasioned by a collision between a wagon owned and driven by the plaintiff Scannell, and on which he and the plaintiff Shea were at the time riding, and an electric car of the defendant company, on January 11, 1898, at the corner of Cambridge and North Grove Streets, Boston. At the trial in the Superior Court, before *Gaskill*, J., the defendant asked numerous requests, of which the following only are material:

8. If Mr. Scannell attempted to hurry across the street in front of a rapidly approaching electric car, he assumed the risk of collision.

11. Owing to the great weight, size, and general unwieldiness of an electric car, also the fact that it must confine itself to the tracks, the driver of a wagon on a street where such cars run must use more care than when he drives on a street where they do not run.

21. As it appears from the evidence that the approaching car was in full view of the plaintiffs before they turned to cross the tracks, then neither plaintiff is entitled to recover on the ground that the car was running at too high rate of speed.

25. Even if the jury find that the car was running at too high rate of speed prior to the accident, and that the motorman did not strike his gong when crossing the street, nevertheless, under the circumstances of this case, the plaintiff, Scannell, is not entitled to recover, since he observed the rate of speed of the car, and that it was approaching before he turned to cross the tracks.

The judge declined to give these requests in the form asked, and the defendant excepted.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions. The facts appear in the opinion.

*M. F. Dickinson, Jr. & W. B. Farr*, for the defendant, submitted the case on a brief.

*A. D. Hill*, for the plaintiffs.

LATHROP, J. The plaintiffs, while driving in a heavily loaded wagon, drawn by one horse, attempted to cross Cambridge Street in Boston, when an electric car of the defendant was coming towards them. A collision resulted, and the ques-

Digitized by Google

tions for the jury were whether the plaintiffs were in the exercise of due care, and whether the defendant's servant, the motorman, was negligent. The evidence was conflicting, and no question is made that the case was not one for the jury.

The defendant asked for twenty-five instructions, which were not given in the form requested, or except as contained in the charge. At the argument before us, the defendant insisted upon only four of these requests, namely, the eighth, eleventh, twenty-first, and twenty-fifth. We proceed to consider these.

In support of the eighth request the defendant contends that the plaintiff in the first case was aware, before he turned to cross the tracks, that the defendant's car was approaching, and that it was running very fast. Hence it is said that he exposed himself to an obvious danger. Reference is made to the cross-examination of this plaintiff. We do not so understand his testimony. He testified on cross-examination that, when he started to turn, the car was "just west of the corner of Anderson Street; that he did not know whether it had stopped at the corner or not; that he should judge it was moving; that he could not say how fast it was then going; that when the car was about at Doherty's liquor store it was going very fast; and that the seat on which he was sitting was then over the space between the two lines of track." The exceptions state that the distance between Anderson Street and North Grove Street is one hundred and ninety-eight feet; and that the liquor store referred to is about opposite Strong Place, which is about half way between Anderson Street and North Grove Street. The exceptions also state that there was nothing to impede the view of both the motorman and the plaintiffs as they approached each other. The theory of the defendant is not supported by the evidence; and the eighth request was properly refused. These remarks dispose also of the twenty-first and twenty-fifth requests.

The eleventh request asks for a ruling that the driver of a wagon on a street where electric cars run must use more care than when he drives on a street where they do not run. Care is, of course, a relative term. It may mean one thing on a country road, and another thing in a crowded street of a city. Hence, juries are generally instructed that the care required of

Digitized by Google

a plaintiff or a defendant is that care which a reasonably prudent person would exercise under like circumstances; and so the jury were instructed in this case, both as to the care required of the plaintiff and that required of the defendant. The situation was clearly pointed out to the jury; and we are of opinion that the judge was not bound to give the instruction requested. With some exceptions, pointed out in *Driscoll* v. *West End Street Railway*, 159 Mass. 142, 145, and which are not material to this case, the defendant stands in respect to the use of the street on exactly the same footing as the driver of any other vehicle. Each is bound to use due care to avoid coming in contact with the other, and neither is entitled to assume that the other will keep out of his way. *Driscoll* v. *West End Street Railway*, *ubi supra*. *Benjamin* v. *Holyoke Street Railway*, 160 Mass. 3. *Ellis* v. *Lynn & Boston Railroad*, 160 Mass. 341. *Robbins* v. *Springfield Street Railway*, 165 Mass. 30, 36. *Galbraith* v. *West End Street Railway*, 165 Mass. 572. *White* v. *Worcester Consolidated Street Railway*, 167 Mass. 43. *Oliver* v. *North End Street Railway*, 170 Mass. 222.

To affect the credibility of the plaintiff Scannell, who testified as a witness, the defendant was allowed, against the plaintiffs' objection, to put in evidence the record of his conviction in the Circuit Court of the United States, in 1878, for fraudulently violating a registered trade-mark. It is provided by the Pub. Sts. c. 169, § 19, "The conviction of a witness of a crime may be shown to affect his credibility." The statute under which Scannell was convicted was shortly afterwards declared to be unconstitutional. *The Trade-Mark Cases*, 100 U. S. 82. This fact was not called to the attention of the court until the day after the evidence was admitted. The judge instructed the jury that the effect of the conviction was for them, and that the fact that the statute had been declared unconstitutional could be taken into consideration.

We are of opinion that the defendant had no ground of exception to this portion of the charge. If the statute was unconstitutional there could be no crime committed. All that Scannell was convicted of was the doing of certain acts which Congress had attempted to make a crime, without having the legal power to do so. *Exceptions overruled.*

Digitized by Google

## CHARLES S. WALKUP *vs.* HENRY C. PICKERING.

Suffolk. March 15, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Malicious Prosecution — Exceptions — Evidence — Malice.*

If no exception is taken to the admission of testimony, the question whether it was admissible or not is not open.

In an action for a malicious prosecution of a former suit brought by the defendant against the plaintiff, it is competent to prove what was said by the defendant in the original action and by his wife to the officer who made the attachment, as to the wife's ownership of the property attached, this being communicated to the plaintiff. It was notice to the plaintiff in that action that the property belonged to the wife, and his answer that "they would not stay without their furniture; they would come around and settle," was admissible to show malice on his part.

If, in an action for a malicious prosecution of a former suit brought by the defendant against the plaintiff, the answer to a question put to a witness, as to what he heard and saw after he arrived at the place where the officer had just attached the alleged property of the defendant in the original action, disclosed anything immaterial or incompetent, the defendant in this action should have asked to have it stricken out; and this not having been done, and no exception having been taken to the answer, he has no ground of complaint.

TORT, to recover damages for a malicious prosecution of a former suit brought by the defendant Pickering against the plaintiff Walkup, in which judgment was entered for Walkup. At the trial in the Superior Court, before *Lilley*, J., it appeared in evidence that before the commencement of the former suit Walkup had been a tenant of Pickering, and that Pickering had been notified that Walkup was to remove from the house on July 31, 1896, and knew that Walkup had a stock in trade at his place of business which might be attached.

One Bullard, a constable, testified in substance that at about the end of July, 1896, Pickering asked him to make an attachment of furniture, saying that a party was to move out of his house on Williams Street where Walkup lived; that he, Bullard, told Pickering he could not legally attach furniture; that Pickering replied his counsel told him that after the furniture had been loaded on the wagon it could be attached legally; and that Bullard told Pickering he did not care to do it, and was not well that day.

Digitized by Google

The defendant testified that he gave to his attorney a bill against Walkup to collect, and informed the attorney that Walkup then owned a horse, wagon, and harness; that the attorney made out a writ, and requested the defendant to meet a constable, to be selected by the attorney, and point out the team, on the following morning, for attachment; that the defendant met the officer as thus arranged and pointed out the team at the house from which Walkup was removing, the defendant claiming that previously to pointing it out he had notified the constable that he should not be responsible for any doings of the constable in the matter; and that there was no furniture upon the wagon at the time the defendant pointed out the team.

It appeared in evidence that one Putnam, a constable, served the writ in the former suit on July 31, 1896. Putnam testified that he met Pickering according to the instructions of his attorney; that after waiting the wagon was driven up in front of the house then occupied by Walkup, and Pickering said, "That is the team and that is Walkup driving it"; afterwards saying, "I don't want you to attach it just now"; that he, Putnam, walked up and down the street while Walkup's household furniture was loading on to the wagon; that after it was loaded Pickering told him to go ahead with the attachment and take the furniture just as it was, and said, "I will see you harmless"; that he told Pickering he could not attach a man's furniture, and Pickering replied, "He [Walkup] will pay the bill rather than let it be taken away"; that Pickering then told him to take the furniture to a warehouse where he, Pickering, had already made arrangements for its storage; and that Putnam accordingly took the load of furniture to the warehouse and met Pickering there.

It appeared that Walkup's wife was present also at the time of the attachment. Putnam was then asked by the plaintiff what, if anything, she said to him when he made the attachment. Upon objection taken to the question the plaintiff asked the witness whether he reported to Pickering what Mrs. Walkup said to him, and Putnam replied that he did. The plaintiff's counsel then inquired of the witness, "Now, then, will you state what Mrs. Walkup did say to you at that time?" The defendant objected, and the judge ruled that if the statement was

Digitized by Google

reported to Pickering it was admissible in evidence. The defendant excepted, and Putnam answered, "She said everything that was attached, everything that was taken away, belonged to her." The plaintiff's counsel then repeated the inquiry to Putnam, "You say you reported to Mr. Pickering that Mrs. Walkup had stated to you that this furniture, horse, and wagon and all the property belonged to her?" To this the witness answered, "I did." Having been asked when he so reported it, he answered, "Say five minutes after — well, in fact, within fifteen minutes from the time I started with the wagon from Williams Street." Having been asked what Pickering said to that, if anything, the witness answered, "He said they would not stay without their furniture; they would come around and settle."

Evidence was introduced that upon reaching the storage warehouse its proprietor told Pickering he could not hold the furniture, and Pickering replied in the same way, "They won't go without their furniture; they will come around and settle this bill"; and that the wagon load was left at this warehouse by Pickering.

One Sutherland testified that he came to Walkup's house after the wagon was loaded with the furniture and saw Pickering sitting in his buggy one hundred and fifty feet or more away. Having been asked by the plaintiff's counsel what he heard and saw after he arrived, the defendant objected. The plaintiff contended that on the evidence already introduced, that Putnam was acting upon the orders of and as the agent of Pickering, a conversation directed to Putnam and in his hearing would be competent. The judge admitted the question, and the defendant excepted. The witness then stated that Walkup said the officer had attached the furniture and team, and the witness replied that the officer could not do that, and that Putnam heard it; and that the witness then said the same thing to Putnam, "You can't attach furniture," and Putnam replied that he was obeying orders and knew his business.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which, *Lilley*, J. having resigned, were allowed by *Bond*, J.

*H. N. Allin & E. K. Piper*, (*W. W. Hart* with them,) for the defendant.

*C. P. Sampson*, for the plaintiff.

Digitized by Google

LATHROP, J. 1. No exception was taken to the admission of the testimony of Bullard, and the question whether it was admissible or not is not open to the defendant. The same is true of the testimony of the warehouseman.

2. It was competent to prove what was said by the defendant in the original action, and by his wife to the officer who made the attachment, this being communicated to the plaintiff. It was the same as if the parties had spoken face to face. This was notice to the plaintiff that the property belonged to the wife, and the answer of the plaintiff in that action, that "they would not stay without their furniture; they would come around and settle," was admissible to show malice on his part.

3. As to the question put to the witness Sutherland, as to what he heard and saw after he arrived, we see no ground of objection. If his answer disclosed anything immaterial or incompetent, the defendant should have asked to have it stricken out. This was not done, and no exception was taken to the answer. *Exceptions overruled.*

---

## AUBURN F. PEARL *vs.* WEST END STREET RAILWAY COMPANY.

Middlesex. March 15, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Personal Injuries — Liability of Corporation for alleged Results of Doctor's Examination.*

**At the trial of an action seeking to charge the defendant corporation with the alleged results of a doctor's examination of the plaintiff, it appeared that the plaintiff had met with an accident and had sued the defendant, whereupon the defendant forthwith sent a doctor to examine him; that the plaintiff's trouble was in his left leg, and the doctor, after directing him to stand upon his right leg, told him to stand upon his left leg; that the plaintiff said that he could not, and his own doctor also said that he could not bear his weight upon that leg; that the examining doctor then told the plaintiff to "try standing on his left leg," and that the plaintiff tried it, fell, and attributed subsequent hysterical trouble to this cause. *Held*, that the doctor was not an agent or servant of the defendant, but an independent contractor; that the argument drawn from the liability of a litigant for his attorney could not avail, and that a verdict was rightly directed for the defendant.**



Digitized by Google

TORT, for personal injuries occasioned to the plaintiff by reason of the alleged negligence of Dr. Rufus P. Hubbard, who, as the plaintiff contended, was employed by the defendant to make a physical examination of the plaintiff for the benefit and information of the defendant. Trial in the Superior Court, before *Bell*, J., who, at the close of the evidence for the plaintiff, directed the jury to return a verdict for the defendant, and, at the request of the plaintiff, reported the case for the determination of this court. If the ruling was wrong, a new trial was to be granted; otherwise judgment was to be entered on the verdict. The facts appear in the opinion.

*C. Reno*, for the plaintiff.

*W. B. Farr*, (*M. F. Dickinson, Jr.* with him,) for the defendant.

HOLMES, C. J. This is an action seeking to charge the defendant with the alleged results of a doctor's examination of the plaintiff. The plaintiff had had an accident and had sued the defendant, whereupon the defendant forthwith sent a doctor to examine him. The plaintiff's trouble was in his left leg, and the doctor, after directing him to stand upon his right leg, told him to stand upon his left leg. The plaintiff said that he could not, and his own doctor also said that he could not bear his weight upon that leg. The examining doctor then told the plaintiff to "try standing on his left leg." The plaintiff tried it, fell, and attributes subsequent hysterical trouble to this cause. At the trial the judge directed a verdict for the defendant and the case is here on exceptions.

It would be a strong thing to say that the evidence warranted finding any one responsible for the accident except the plaintiff himself. The doctor's request that he should try standing on his left leg was not medical advice or direction upon a matter as to which the plaintiff had put himself into the doctor's hands. On the contrary, it came from one who avowedly was in an adverse interest and who had no authority of any kind. Furthermore, it recognized in its very words that perhaps the plaintiff was right in thinking that he could not stand in that way. It only called on him for an experiment in a region of admitted doubt. How far the experiment should go necessarily was left to the plaintiff himself when he should make it. If he carried it too far the doctor was not to blame. See *Latter* v.

Digitized by Google

*Braddell*, 50 L. J. C. P. 166, a much stronger case than the present.

But, further, the doctor was not an agent or servant of the defendant in making his examination; he was an independent contractor. There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer. See *Linton* v. *Smith*, 8 Gray, 147; *Milligan* v. *Wedge*, 12 Ad. & El. 737, 741, 742. In this case the doctor was informing himself according to the suggestions of his own judgment, in order to advise and perhaps to testify for the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it was left wholly to him. See *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411, 424; *Secord* v. *St. Paul, Minneapolis, & Manitoba Railway*, 18 Fed. Rep. 221, 225.

An argument is addressed to us drawn from the liability of a litigant for his attorney. *Shattuck* v. *Bill*, 142 Mass. 56. But no argument can be trusted that relies on that analogy. Perhaps the liability for an attorney rests on the fact that the very essence of his employment was to represent the person of a party to a suit. *Attornatus fere in omnibus personam domini representat.* Bract. fol. 342a. It must be remembered that this right of representation in a lawsuit was conceived with difficulty and only gradually granted, and as first allowed seems to have been worked out through some sort of fictitious identification. Whether for that reason or another attorneys sometimes have been spoken of as servants, (*Anon.* 1 Mod. 209, 210,) and their acts within the scope of their employment always have been said to be the acts of their clients. *Parsons* v. *Loyd*, 3 Wils. 341, 345. *Barker* v. *Braham*, 2 W. Bl. 866, 868, 869; *S. C.* 3 Wils. 368, 374. *Bates* v. *Pilling*, 6 B. & C. 38, 41. *Newberry* v. *Lee*, 3 Hill, (N. Y.) 523. *McAvoy* v. *Wright*, 137 Mass. 207. In short, the liability of client for attorney is the result of a special series of events, and cannot be allowed to found a general rule.

We are of opinion that on one or the other of the foregoing grounds the direction was right.

In the view which we take, the exceptions to the exclusion of

Digitized by Google

evidence become unimportant. The questions excluded went to the general skill of the doctor's examination. This was immaterial, as the ground of the claim was a specific fact definitely stated. *Judgment on the verdict.*

---

JOHN J. MARTIN *vs.* HELEN HAMLIN & another.

Suffolk. March 15, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Defective Title — Specific Performance.*

The validity of a foreclosure sale, made not at the instance of the mortgagee or for the purpose of getting payment of the mortgage debt, but for the benefit of a purchaser of the equity under a defective conveyance, and for the purpose of curing that defect by cutting off the interest of a legal owner, that owner and his only known attorney being residents of foreign countries, so distant that the notice of the sale could not be expected to reach them, is so doubtful that no one should be compelled to take a title depending upon it for validity.

BILL IN EQUITY for the specific performance of a written agreement, by which the parties undertook to exchange certain parcels of real estate, the plaintiff's being known as the "Hotel Alexandra" in Boston. At the trial in the Superior Court, before *Gaskill*, J., the defendants requested a ruling that they were not required to take the offered title; but the court ruled otherwise, and ordered a decree requiring specific performance of the contract. The facts appear in the opinion.

*R. M. Morse*, (*L. Bass, Jr.* with him,) for the defendants.

*H. G. Allen*, for the plaintiff.

BARKER, J. Upon the facts appearing in the bill of exceptions the defendants requested the court to rule that they were not required to take the offered title, but the court ruled otherwise. This was in effect a ruling of law that they were required to take the title.

Both parties concede that a mere possibility or suspicion of a defect in title will not prevent the ordering of specific performance, and that it will not be enforced when there is a fairly reasonable doubt as to the title. See *Hayes* v. *Harmony Grove*

Digitized by Google

*Cemetery*, 108 Mass. 400; *Cushing* v. *Spalding*, 164 Mass. 287; *Chauncey* v. *Leominster*, 172 Mass. 340.

The transfer was to be made and a deed was tendered on July 1, 1897. The defendants concede that if the foreclosure of June 28, 1897, was valid as against Lauritz C. Bistrup, the plaintiff could have given perfect title to the whole property.

Bistrup was a Danish officer residing in Greenland. On April 24, 1894, he had inherited an undivided interest of one fiftieth part in the land. This interest fell to him as one of several heirs of Emil C. Hammer, who died seised of one undivided half of the land. On July 2, 1874, Hammer and the owner of the other half had made a power of sale mortgage of the whole property to a corporation, and this mortgage, reduced to the amount of $50,000 of principal, overdue since 1890, was outstanding when the agreement sought to be enforced was made. Interest had been paid promptly, and there had been no breach of the mortgage, except the non-payment of the principal.

On May 11, 1884, Bistrup had given a power of attorney, not under seal and not acknowledged, to a resident of Copenhagen, granting "the full power for me and in my place and stead to administer on all finances in relation to myself, to have, to receive and to receipt for all monies and other valuables, to collect and, if necessary, to sue and institute proceedings according to law for the same, to compromise and to settle before or after such proceedings may have commenced, to represent me in the settlement of estates to which I may be heir, and to make all necessary arrangements for the administration of such estates, to demand, to hold and to receipt for all monies coming to me from such estates; in fact, to do and perform all and everything requisite; and all that my attorney shall do or perform shall be binding upon me as if I had personally done the same." Some three or four years before the making of the agreement sought to be enforced, a deed of Bistrup's interest in the land had been made under this power of attorney, and the person who claimed under that deed supposed that he had bought up the interests of all the Hammer heirs, and he had been in uninterrupted possession of the property during three or four years.

The bill of exceptions has no statement as to whether during that period Bistrup had received any payments from his

Digitized by Google

attorney, or had been informed of the deed made under the power. The holder of the Bistrup deed was ready to convey his title to the plaintiff, or as the plaintiff might direct.

The agreement between the plaintiff and the defendants bore date April 17, 1897, and performance was to be made on or before May 1, 1897. Each party employed competent conveyancers to examine the title, and the conveyancers agreed that it was defective because Bistrup's power of attorney was not under seal or acknowledged. The defendant's conveyancers also advised that its language did not authorize a conveyance of real estate. Thereupon the time for performance was extended to July 1, 1897. The plaintiff's conveyancer was of opinion that a good title could be obtained by arranging with the mortgagee to foreclose the mortgage, and he made such arrangements, and foreclosed the mortgage by a sale under the power on July 28, 1897. The title tendered to and declined by the defendants on July 1, 1897, came under this foreclosure sale. This plan of making title by foreclosure was communicated to the defendants in May, and their counsel replied that it would be a serious question whether they could accept such a title. Before the sale and after it was advertised they repeatedly gave notice that they should refuse to accept a title made under the proposed foreclosure.

The purpose of the foreclosure was not to get in the money due upon the mortgage, but it was procured by the plaintiff, and allowed by the mortgagee to be made by the plaintiff's conveyancer, for the purpose of cutting off the Bistrup title, and of curing some other defects. The other defects, it is now agreed, could have been cured before July 1, 1897, if the defendants had not previously notified the plaintiff that they would not take a title made under the foreclosure. The mortgagee was informed of the situation, and it was part of the plan of foreclosure, upon which the plaintiff's conveyancer was authorized by the mortgagee to make it, that upon its completion a mortgage for $50,000 should be given back to the mortgagee. The price bid at the sale was $70,000, of which the sum of $20,000, furnished by the plaintiff, was paid in cash to the mortgagee. After deducting the expenses of the sale the mortgagee paid one half of the $20,000 to each of the two

Digitized by Google

parties from whom the plaintiff had a contract to convey to him the land. The purchaser at the foreclosure sale deeded to the plaintiff and he tendered to the defendants a deed which they declined, on the ground that they were not required to take the title obtained under the foreclosure.

It is an inference of law from the facts stated that the power of sale was not exercised by the mortgagee of its own instance, or for the purpose of getting in the mortgage debt, but for the purpose of cutting off the possible interest of Bistrup in the land. In other words, the use of the power was lent by the mortgagee to the plaintiff for that purpose. Bistrup was in Greenland and his attorney in Copenhagen. Bistrup's power of attorney, such as it was, had been given some ten years before he inherited his interest in the land. It did not appear that he ever had known of his interest, or of its conveyance under his power, or that he had received payment on account of that conveyance. The mortgagee disposed of the money received from the sale by paying over to the party holding under the Bistrup deed the share which was Bistrup's, if that deed was void.

All of these circumstances were known to the mortgagee, to the plaintiff whose conveyancer had charge of the sale, and to the purchaser who acted for the plaintiff and conveyed to him. The defendants also had full knowledge, so that the title tendered to them would not in their hands be that of a purchaser without notice.

If the Bistrup deed was not clearly void, the title made under his power was so doubtful that equity would not require the defendants to accept it. The foreclosure was made upon the theory that the legal estate in one fiftieth of the land was still in Bistrup, and the purpose of the sale was to cut off that interest. If he was yet seised of the legal title, the mortgagee in making the sale acted as his trustee and agent, and was bound to execute the trust with a due regard to his interest. *Hood* v. *Adams*, 124 Mass. 481, 484. *Briggs* v. *Briggs*, 135 Mass. 306, 309. A mere literal compliance with the terms of the power, if the mortgagee failed to do its duty to Bistrup, would not make the sale valid in favor of one charged with knowledge of the delinquency. *Clark* v. *Simmons*, 150 Mass.

Digitized by Google

357, 359. See also *Montague* v. *Dawes*, 14 Allen, 369; *Thompson* v. *Heywood*, 129 Mass. 401, 403; *Fenton* v. *Torrey*, 133 Mass. 138.

It is not now necessary to decide that a foreclosure sale is void if made, not at the instance of the mortgagee or for the purpose of getting payment of the mortgage debt, but for the benefit of a purchaser of the equity under a defective conveyance, and for the purpose of curing that defect by cutting off the interest of a legal owner, especially when that owner and his only known attorney are residents of foreign countries, so distant that the notice of the sale could not be expected to reach them. See *Robertson* v. *Norris*, 1 Giffard, 421, 424.

It is enough to hold that the validity of such a sale is so doubtful that no one should be compelled to take a title depending upon it for validity. The ruling requested by the defendants should have been given. *Exceptions sustained.*

---

WILLIAM A. MUNROE & others, trustees, *vs.* HENRY S. DEWEY, trustee, & another.

Suffolk. March 15, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Will — Life Interest not passing to Trustee in Bankruptcy.*

A life interest given by will which directs that "no income or principal shall in any case be assignable or alienable by anticipation or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his or her actual receipt thereof," does not pass to the life tenant's trustee in bankruptcy.

BILL IN EQUITY for instructions as to the construction of the will of Eustace C. Fitz. Hearing before *Knowlton*, J., who, at the request of the parties, reserved the case for the consideration of the full court. The facts appear in the opinion.

*F. E. Fitz, pro se.*

No counsel appeared for the plaintiffs.

HOLMES, C. J. This is a bill brought by trustees under a will for instructions whether certain income shall be paid to the legatee or to his trustee in bankruptcy. The income was given to

Digitized by Google

the legatee for life, and the will expressly directs that "no income or principal shall in any case be assignable or alienable by anticipation, or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his or her actual receipt thereof." Even if this clause attempts to go further than the law permits, its validity with regard to an equitable life estate is settled, as against both attaching creditors and assignees in insolvency. *Billings* v. *Marsh*, 153 Mass. 311. The trustee in bankruptcy very candidly admits that he does not think that he can distinguish the decisions or make good his claim. We see no ground for a distinction in the words of the Bankrupt Act, § 70. U. S. St. of July 1, 1898, c. 541; 30 U. S. Sts. at Large, 544. Some matters discussed by the defendant Fitz in his unnecessarily elaborate brief are not open.

*Decree accordingly.*

---

CHARLES D. ADAMS, administrator, *vs.* EMILY D. JONES & others.

Middlesex. March 19, 1900. — May 18, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

*Will — Brothers and Sisters and their Heirs — Limitation — Purchase.*

A testator gave by will all his estate to his wife for life, and "whatever remains at her decease shall be divided into two equal parts to be inherited and divided, the one moiety by my brothers and sisters and their heirs, and the other moiety by my said wife's brother and sisters and their heirs." *Held*, on the death of the widow, many years after that of her husband, that the words "and their heirs" were words of limitation, and that, subject to the widow's rights in the estate during her life, the fee in one moiety vested in the sisters and brother of the testator's wife who were living at the date of the will the day of the testator's death, as tenants in common, and that the other moiety vested in the brothers and sisters of the testator living at his death, as tenants in common.

PETITION IN EQUITY, by the administrator *de bonis non* with the will annexed of the estate of Oliver Bacon, for instructions as to the construction of his will as to the distribution of the personal estate in his hands, being the unexpended balance of

Digitized by Google

proceeds of real estate sold under license of the Probate Court by him as administrator to pay debts and charges of administration. The value of the real estate remaining unsold was $11,750. Hearing before *Knowlton*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

*C. D. Adams, pro se*, read the papers in the case.

*S. Z. Bowman*, for certain heirs.

*E. F. Johnson*, for certain other heirs.

*J. M. Raymond*, for the heirs at law of Elizabeth Moore, a sister of the testator, submitted the case on a brief.

LORING, J. Oliver Bacon died, leaving a will containing two bequests: the first was a bequest of "all my estate, both real and personal, wherever it may be situated, after all just claims against me or my estate are satisfied," to his wife for life; and "whatever remains at her decease shall be divided into two equal parts to be inherited and divided, the one moiety by my brothers and sisters and their heirs, and the other moiety by my said wife's brother and sisters and their heirs."

The will was made in 1858, on the day on which the testator died, and his widow died twenty-nine years later, in 1887. When the will was made, he had four sisters and two brothers, and several nephews and nieces, the issue of two sisters and one brother who had previously died; there were also issue of one brother who disappeared about 1840, that is, about eighteen years before the will was made, and who has not since been heard from.

The children of the deceased brother, or brothers and sisters, claim that the class, to whom the remainder was given, consisted of the brothers and sisters living at the date of the will, the day of the testator's death, and of the heirs then living of the brothers and sisters who had previously died; and they rely on the case of *Huntress* v. *Place*, 137 Mass. 409, in support of this contention. The bequest in *Huntress* v. *Place* was practically the same as the bequest in the case at bar; but the circumstances under which the will was made were different; in that case there was but one sister of the testator alive when he made his will, and it was held, under those circumstances, that the words "and their heirs" were not words of limitation,

Digitized by Google

but were words of purchase used to describe the members of the class, which were to take in remainder subject to the life estate in the testator's widow. This result was reached because some meaning had to be given to the use of the word "sisters" in the plural, in the place of "sister" in the singular, and on the authority of *Gowling* v. *Thompson*, L. R. 11 Eq. 366, *n*. The testator's bequest in *Gowling* v. *Thompson* was to "his 'brothers and sisters or their issue' in equal shares as tenants in common, 'and to their respective heirs, executors, administrators, and assigns,'" and it was held that the children of a deceased sister took under the words "or their issue"; that those words would be construed to be part of the description of the class and not a substitutional gift, in case one of the class previously described died; that since the testator had but one sister, and he gave a bequest to his sisters or their issue, the word "sisters" must have been used in the plural in place of the singular, to indicate the stirps, and the words "or their issue" were a part of the description of the class; and for that reason the case did not come within *Christopherson* v. *Naylor*, 1 Mer. 320, which has been much relied upon by counsel for the surviving brothers and sisters in this case. But the question which arose in *Huntress* v. *Place*, and which arises in this case, is not the question which arose in *Christopherson* v. *Naylor* and *Gowling* v. *Thompson*; in those cases, the question was whether the words, which were confessedly words of purchase, constituted a substitutional gift, or were words enlarging the description of the class; in this case, as in *Huntress* v. *Place*, the question is whether the words are words of purchase or words of limitation.

We are of opinion that in the case at bar the words "and their heirs" are words of limitation, and that the gift cannot be construed to be a gift to the brothers and sisters of the testator then living and to the heirs of brothers and sisters who had previously died.

The gift is a gift, in the first place, to "my brothers and sisters." The claimants were not brothers and sisters of the testator, but nephews and nieces, and therefore are not within the class described by those words. The rest of the gift is contained in the words "and their heirs"; grammatically, this

Digitized by Google

means "and the heirs of the testator's brothers and sisters already mentioned."

But apart from the conclusion to be reached by a strict grammatical construction of the words used, it is settled in this Commonwealth that in the case of a gift to A. B. and his heirs, the words "and his heirs" are words of limitation and not of purchase, even though the gift is a gift of personal property alone; and that such a gift of personal property is a gift to A. B. absolutely, and is not a gift to A. B. if living and to his heirs if he is dead. *Wood* v. *Seaver*, 158 Mass. 411. See also *Bryson* v. *Holbrook*, 159 Mass. 280; *Horton* v. *Earle*, 162 Mass. 448.

No reasonable distinction can be made between the construction of the words "and his heirs" added to a gift of personalty to a person by name, and the construction of those words when added to a gift to a class, such as brothers and sisters. If, in the first of these two cases, the words are not construed to have been inserted to prevent the legacy lapsing, in case the person named dies after the will is made, in the second case they cannot be construed to have been introduced to include the heirs of brothers and sisters who had previously died. Furthermore, it would be inconsistent with the rule of construction adopted in *Wood* v. *Seaver*, 158 Mass. 411, to hold that the words "and his heirs" in the case at bar are words of purchase. In *Wood* v. *Seaver*, the subject of the gift was personal property, and personal property only; in such a case, "and his heirs" are not properly words of limitation at all; they add nothing to the gift which is contained in the words "to A. B." In spite of that, they were held in *Wood* v. *Seaver* to be words of limitation. But in the case at bar, the words "to my brothers and sisters and their heirs" operated on real estate alone, though the gift in terms applied to "both real estate and personal" estate. In such a case, the addition of the words "and their heirs" is most proper to indicate that the persons described were to take a fee, though it is now provided by statute that the insertion of those words is not indispensable. Pub. Sts. c. 127, § 24. It is to be noticed that the words used by the testator are the words "and their heirs"; had the words been "or their heirs," and the only property been personal property, there would have been more

Digitized by Google

ground for the contention of these defendants. See *In re Porter's trust*, 4 K. & J. 188.

Counsel for these defendants have urged upon us very strenuously the opinion of Sir George Jessel, Master of the Rolls in *In re Smith's trusts*, 5 Ch. D. 497, 498, *n.*, in which he said: "The question is, whether I am to attribute to this testatrix the capricious intention that, if a brother died before her will, his children should not take, but that, if a brother died after her will, his children should take." That was perhaps a fair question to be considered in construing the words used in that case, which, taken in connection with other provisions of the will, were susceptible of two meanings. But when words have an ascertained meaning, and admit of a rational interpretation, and there is nothing in other portions of the will indicating that they were not used in their ordinary sense, a court cannot depart from that ordinary sense for the purpose of giving effect to what it may be guessed was the intention of the testator, because it would result in a fair distribution of the estate. If, in such a case, the testator did in fact intend to make an equal distribution, he has failed to express that intention in using the words he did use, and the power of the court goes no further than to ascertain the true meaning of the words used by him as he used them.

The only case in support of the claimant's intention which has come to our attention is that of *Brothers* v. *Cartwright*, 2 Jones, Eq. 113; but no reasons are given in the opinion in that case for adopting that conclusion. *Bond's appeal*, 31 Conn. 183, does not support the contention of these defendants; in that case it was held that the heirs of deceased children were included in the gift to "my children and their heirs," because of the addition of the words "respectively to be divided in equal shares between them."

The question whether William Bacon, who disappeared about 1840, or about eighteen years before the death of the testator, is to be treated as alive at the death of the testator or not is not now before the court.

We are of opinion that the administrator *de bonis non* with the will annexed is the person to make the distribution of the $1,631.75, with any interest which may have accrued thereon

Digitized by Google

in his hands, being "the unexpended balance of the proceeds of the sale of real estate of said Oliver Bacon sold to pay debts with interest thereon." That fund is, by virtue of Pub. Sts. c. 142, § 9, to be treated as real estate and should be paid over by the administrator to those entitled thereto. We are further of opinion that, subject to the widow's rights in the estate during her life, the fee in one moiety vested in the sisters and brother of the testator's wife who were living at the date of the will the day of the testator's death, as tenants in common, and that the other moiety vested in the brothers and sisters of the testator living at his death, as tenants in common.

The conclusion to which we have come disposes of the other questions which were stated in the bill. A decree must be entered by a single justice in accordance with this opinion.

*So ordered.*

---

EDWARD W. HOOPER & another, executors, *vs.* EDWARD P. SHAW.

SAME *vs.* SAME.

Suffolk. March 19, 1900. — May 18, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

*Collateral Inheritance Law — Payment of Tax — Charitable Institution.*

A legacy tax paid to the United States under the St. of June 13, 1898, c. 448, §§ 29, 30, is to be deducted before paying the State succession tax under St. 1891, c. 425.

A legacy left to the New England Trust Company of Boston, "the interest of which they will pay to needy aged men and women who had been in better circumstances in early life but had become in want when in old age," is not to or for a charitable institution within the meaning of the collateral inheritance law, St. 1891, c. 425.

TWO PETITIONS to the Probate Court by the executors of the will of Edward Austin, asking instructions as to the payment of a succession tax under St. 1891, c. 425. Decrees were entered and a hearing was had in this court on appeal, before *Knowlton*, J., who reserved the cases for the consideration of the full court. The facts appear in the opinion.

Digitized by Google

*J. C. Gray*, for the petitioners.

*A. W. DeGoosh*, Assistant Attorney General, for the respondent.

HOLMES, C. J. Only two questions were argued before us. The first of these is whether the legacy tax paid to the United States under St. June 13, 1898, c. 448, §§ 29, 30, is to be deducted before paying the State succession tax under St. 1891, c. 425. We are of opinion that it is to be deducted.

Whatever the nature of the State succession tax, it is admitted and is obvious that the value of the property concerned is made the measure of the tax. This appears from the words of the act, which also show at what moment the value is to be taken. The words are "property . . . which shall pass . . . to any person." Without throwing doubt upon the power of the State to adopt a harsher rule, such as has been applied by some of the surrogates in New York, we are of opinion that these words most naturally signify the property which the legatee actually would get were it not for the State tax imposed by the sentence in which the words occur. See *In re Merriam*, 141 N. Y. 479, 484; *S. C. sub nom. United States* v. *Perkins*, 163 U. S. 625, 630. It already has been decided upon this ground that expenses of administration are to be deducted. *Callahan* v. *Woodbridge*, 171 Mass. 595, 599, 600.

The question is not one of precedence between the Commonwealth and the United States, as it was put by the Assistant Attorney General. It is in substance one of justice, and in form one of construction. The United States recognizes, as it ought, the same principle by deducting the State succession tax before computing its own. State inheritance tax laws are apt to aim at seizing all that they can get without regard to consistency of principle, but when it is possible to interpret them to mean what is just, we must do so. Compare St. 57 & 58 Vict. c. 30, §§ 7 (4), 20.

The other question is whether a succession tax is payable on a legacy left to the New England Trust Company of Boston, "the interest upon which they will pay to needy aged men and women who had been in better circumstances in early life, but had become in want when in old age." The legacy was $100,000, but was cut down to $80,000 by a compromise approved as pro-

Digitized by Google

vided in Pub. Sts. c. 142, §§ 12–17. The exception in the act of 1891 which is relied on is in the words "other than . . . to or for charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation." Giving the broadest latitude to the word "institution," and assuming that there is an exemption if a charitable institution of the kind described is either trustee or *cestui que trust*, we cannot read the words as meaning to embrace all charitable gifts. That is what the argument for the legatees comes to. It is suggested that we are to read the word "institution" as equivalent to the German *stiftung*, and as satisfied when there is a fund permanently devoted to charity. We think it very clear that this would be a perversion of the words from their plain meaning and the substitution of an unidiomatic and remote conception which would not occur to ordinary minds. The contrary is implied in *Essex* v. *Brooks*, 164 Mass. 79. Very likely the institution need not be incorporated, but it is contemplated as an owner of property, not as property.

*Decree accordingly.*

---

WILLIAM S. DEXTER & others, trustees, *vs.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE & others.

WINSLOW WARREN, administrator, *vs.* SAME.

Suffolk. March 20, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Valid Gift to Public Charity — Residuary Clause — Void or Lapsed Legacies — Adoption by Testator of Provisions of Will of another Testator.*

A gift by will to Harvard College which is to be held as a permanent fund, and the income of which, less five per cent to be accumulated, is to be expended for such general purposes of the corporation as the president and fellows shall deem most useful, unless it is all expended in a certain department of the charitable work which the testator designates, and for which he directs a preference, by the officers of the college in the administration of the proceeds of the fund, is a valid gift to a public charity; and there is no ground for the contentions that in making the gift the testator was precluded by law from directing that it should be devoted primarily to the establishment of scholarships, and that in providing for its administration he was precluded from directing that preference should be

Digitized by Google

given to his kin or to any other class of persons that he favored; and even if this provision for preference of kin were held to be void, the bequest for general uses of the college would still be valid as a residuary provision, which applies to void legacies as well as to legacies which lapse for any other cause. If the requirement that five per cent of the annual income shall be reserved for accumulation be treated as void, or if the operation of it be limited to a term of years, the gift will remain without change except as affected by omitting to reserve a part for accumulation.

A gift by will of the residue of an estate to Harvard College for general use in the medical department, subject to special reasonable directions of the testator for the better endowment of certain professorships, is a valid gift to a public charity.

By A.'s reference in his will to a legacy given by B. in his will, without reciting at length the provisions of the will in regard to it, A. adopts for his property the disposition which B. makes of the legacy; and the questions raised under the will of A. are answered by the decision of the court in regard to the will of B.

THE FIRST CASE was a bill in equity by the trustees under the will of Calvin Ellis to obtain the instructions of the court as to the construction thereof. The will provided that the trustees should pay the net income of certain property to the sister of the testator Lucy Ellis, during her life, and upon her death without issue living at her decease should pay to the president and fellows of Harvard College $50,000 for certain purposes set forth in the opinion, and should convey the residue to the said president and fellows for certain other purposes set forth in the opinion. The testator's will was proved in 1884. Lucy Ellis died on June 22, 1899, without issue living at the time of her decease and never having been married. She left a will which was proved on August 17, 1899.

THE SECOND CASE was a bill in equity by the administrator with the will annexed of the will of Lucy Ellis, to obtain the instructions of the court as to the construction thereof. The cases were heard together upon the bill and answer in each case, and, at the request of the parties, were reserved by *Knowlton*, J. for the consideration of the full court. The facts appear in the opinion.

*J. C. Gray*, for Harvard College.

*H. W. Putnam*, (*J. F. Burke* with him,) for certain next of kin and heirs at law.

KNOWLTON, J. The first question in these cases arises under a provision in the will of Calvin Ellis, which is as follows: "My trustees shall pay to the president and fellows of Harvard College fifty thousand dollars, or if the said property do not



Digitized by Google

amount to fifty thousand dollars in value, they shall pay over the whole thereof to the said president and fellows, to hold the same as a permanent fund and apply the net income thereof, and of all substituted property, after first deducting and accumulating in every year five per centum of such net income as an increase of the fund, as follows: To pay the fees of tuition and instruction, the cost of text books, room rent, and reasonable board, of such descendants of David Ellis and Buelah Newell formerly of Dedham, and John Ellis and Hannah Ellis, formerly of Walpole, as may be students in Harvard college, whether as graduates or under-graduates. Every one of such descendants shall be entitled thereto upon application therefor, provided his or her morals and scholarship are such as to allow him or her to remain a member of the college. But the period during which any student shall enjoy the benefit of this provision shall not exceed the time usually allotted to students in the several departments with which such student may be connected, unless the president and fellows, by an express vote, extend the same. And if the whole or any part of such income, after accumulating five per centum thereof as aforesaid in any year, remains unexpended from the failure of persons entitled as above declared to receive the same upon application, then the same shall be expended upon the close of such year, for such general purposes of the college as the president and fellows shall deem most useful." Considering this in its different parts to ascertain its meaning, we find that it is a gift to a public charitable corporation, which is to be held as a permanent fund, and the income of which, less five per cent to be accumulated, is to be expended for such general purposes of the corporation as the president and fellows shall deem most useful, unless it is all expended in a certain department of the charitable work which the testator designates, and for which he directs a preference by the officers of the college in the administration of the proceeds of the fund. That a gift for the promotion of education in Harvard College is a public charity is a proposition too plain to need discussion. In St. 43 Eliz. c. 4, § 1, "Schools of learning, free schools, and scholars in universities" are mentioned as charitable objects. Such a public charity need have no special reference to the poor. In *American Academy* v.

Digitized by Google

*Harvard College*, 12 Gray, 582, 594, Chief Justice Shaw says: "That a gift designed to promote the public good, by the encouragement of learning, science and the useful arts, without any particular reference to the poor, is regarded as a charity, is settled by a series of judicial decisions, and regarded as the settled practice of a court of equity. Such is a bequest for the improvement of a city, . . . to establish new scholarships in a college, . . . to found and endow a college." In *Perin* v. *Carey*, 24 How. 465, 506, is this language: "A charity is a gift to a general public use, which extends to the rich, as well as to the poor. *Jones* v. *Williams*, Ambl. 651. Generally, devises and bequests having for their object establishments of learning are considered as given to charitable uses, under the statute of Elizabeth. *Attorney General* v. *Earl of Lonsdale*, 1 Sim. 105." From very early times the founding of scholarships in universities has been favored by the law, and such scholarships are none the less public charities that they are open to the rich as well as the poor. Payment of the "fees of tuition and instruction, the cost of text books, room rent, and reasonable board" of students in universities, is a strictly educational object, and is an ordinary purpose of the founders of scholarships. There is no ground for the contention that in making this charitable gift the testator was precluded by law from directing that it should be devoted primarily to the establishment of scholarships.

Nor have we been referred to any case which holds that in providing for the administration of such a charity the founder is precluded from directing that preference shall be given to his kin, or to any other class of persons that he favors. The only persons to be preferred under this provision are the lineal descendants of the testator's grandparents. The testator contemplated a probability that in some of the years, and perhaps most of them, there will be a failure of persons who are entitled to be preferred in the expenditure of the income. At all such times there is no limitation upon the discretion of the officers of the college in using the money as they think best.

The right of a founder to give such directions in regard to the management of a charity is generally recognized, and, so far as we know, is not denied by any court. A direction requiring

Digitized by Google

such a preference is assumed to be a lawful exercise of his rights and powers. *Flood's case*, Hobart, 136. *Spencer* v. *All Souls College*, Wilmot, 163. *Attorney General* v. *Sidney Sussex College*, 34 Beav. 654; L. R. 4 Ch. 722. *Franklin* v. *Armfield*, 2 Sneed, 305. *Perin* v. *Carey*, 24 How. 465. *Kent* v. *Dunham*, 142 Mass. 216. *Darcy* v. *Kelley*, 153 Mass. 433. *Attorney General* v. *Duke of Northumberland*, 7 Ch. D. 745. *Ingraham* v. *Ingraham*, 169 Ill. 432, 464, 467. *Webster* v. *Morris*, 66 Wis. 366, 392.

If the provision for the preference of kin of the testator in the administration of this charity were held to be void, the bequest for general uses of the college would still be valid, and would carry the whole of the income under the last sentence above quoted. If there is a failure of persons entitled because under a gift of this kind no such persons legally can be entitled, the amount which otherwise would be expended for their benefit is by the express terms of the will to be used for general purposes of the college. In other words, this is a plain residuary provision which applies to void legacies as well as to legacies which lapse for any other cause. *Thayer* v. *Wellington*, 9 Allen, 283. *Batchelder, petitioner*, 147 Mass. 465. *Teele* v. *Bishop of Derry*, 168 Mass. 341. *New* v. *Bonaker*, L. R. 4 Eq. 655. *In re Rymer*, [1895] 1 Ch. 19. *Chapman* v. *Brown*, 6 Ves. 404, and some early English cases which follow it are cited in support of the proposition that if the provision preferring the kin of the testator is void, the provision for the general purposes of the college must fall with it, notwithstanding that it purports to dispose of a residue. The doctrine of these cases, as applied to a case like the present, has never been adopted in Massachusetts, and it has been greatly limited if not completely overruled by later decisions in England. *Fisk* v. *Attorney General*, L. R. 4 Eq. 521. *Hunter* v. *Bullock*, L. R. 14 Eq. 45. *Dawson* v. *Small*, L. R. 18 Eq. 114. *In re Williams*, 5 Ch. D. 735. *In re Birkett*, 9 Ch. D. 576. *Champney* v. *Davy*, 11 Ch. D. 949. *In re Vaughan*, 33 Ch. D. 187. We are of opinion that on this ground, apart from other considerations, the next of kin and heirs at law of the testator fail to sustain their claim.

The requirement that five per cent of the annual income shall be reserved for accumulation cannot avail the heirs and next of

Digitized by Google

kin in this proceeding. If it be treated as void, or if the operation of it be limited to a term of years, the gift will remain without change except as affected by omitting to reserve a part for accumulation. The effect of the requirement is to take money from one part of the property held for charity and put it with another part of the property held for the same charity. If this change is forbidden, the whole property will still be held and used for the charity. *Odell* v. *Odell*, 10 Allen, 1. *St. Paul's Church* v. *Attorney General*, 164 Mass. 188.

It is contended by the heirs at law and next of kin that the residuary clause of the will is invalid. This is as follows: "All the residue and remainder of the said trust property, my trustees in the event aforesaid shall convey in fee simple, transfer and pay over to the said president and fellows, to hold the same as a permanent fund, and apply the net rents and income thereof, and of all substituted property; in every year, after first deducting and accumulating in every year five per centum of such net income as an increase of the fund towards paying the salary of a professor of pathological anatomy. Provided, however, that if such professor would receive in any one year, if the whole of the said net income remaining after such deduction of five per centum were paid to him, a salary of more than five thousand dollars for such year arising from gifts, legacies and other permanent endowments, including the income of this legacy, then, and in every such year, the amount paid him from the income of this legacy shall be reduced, so that the total income from such sources shall be five thousand dollars and no more. And if the income from gifts, legacies and other permanent endowments, exclusive of the income of this legacy shall amount in any year to five thousand dollars, then, and in every such year, the income from this legacy shall be withheld altogether from such professor. The amount so withheld whether it be the whole or a part of the net income, after deducting five per centum, shall be applied to the salary of the professor of physiology, with the same provisions and limitations as those herein declared touching the salary of the professor of pathological anatomy; and any amount in every such year still remaining unapplied, shall next be applied to the salary of the professor of anatomy, with the same provisions and limitations as are

Digitized by Google

herein declared touching the salary of the two professors first named. And if the whole or any part of such income still remains unexpended in any year, the same shall be expended in such year for such other purposes in the medical department of the said college as the said president and fellows shall deem most useful." The general view which we have taken of the preceding clause is equally applicable to this. The residuum is given to the college for general use in the medical department, subject to special directions of the testator for the better endowment of certain professorships. There is no legal objection to these directions. They are merely reasonable provisions affecting the administration of the trust. It follows that the fund in question held under each of these clauses is to be paid to the president and fellows of Harvard College.

The questions raised under the will of Lucy Ellis have all been answered by what we have said in regard to the will of her brother Calvin Ellis. By her reference to her brother's legacy of $50,000, without reciting at length the provisions of his will in regard to it, she adopts as hers for her property the disposition which he makes of that sum. The funds held by her administrator with the will annexed must also be paid to the president and fellows of Harvard College.*

*Ordered accordingly.*

* The will contained two provisions in point, the first, a bequest to the president and fellows of Harvard College, to be held on the same terms as the residue of her brother's estate, and the second, a bequest of the residue of her estate, "to be added to and disposed of as part of and in the same manner as the permanent fund and bequest of fifty thousand dollars made and given by my brother Calvin Ellis, by his last will."

Digitized by Google

CHARLES N. MUNROE *vs.* EDWARD A. CARLISLE & others.

Suffolk. March 21, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Personal Injuries — Liability of Lessor during Term — Judgment against one Joint Tortfeasor a Discontinuance as to others.*

The lessor of a building, which the lessee has covenanted in writing to keep and put in repair, is not liable to a person who, during the term and more than three years after the lessee has taken possession under the lease, while walking on the sidewalk in front of the building is injured by the fall of a piece of the capstone from one of the windows thereof.

Taking judgment against less than all of the defendants in an action of tort is a discontinuance as to the others.

TORT, against Charles C. Hutchinson the lessor, and E. A. Carlisle and S. A. Pope the lessees, of a building on Sudbury Street in Boston, for personal injuries sustained by the plaintiff while walking on the sidewalk in front of the defendants' building by the fall of a piece of stone from the capstone of a window in the third story of the building. At the trial in the Superior Court, before *Aiken*, J., the jury returned a verdict for the plaintiff, and the defendant Hutchinson alleged exceptions. After the trial the plaintiff moved for judgment against the defendants, Carlisle and Pope, the motion was allowed, and those defendants appealed to this court. The material facts appear in the opinion.

*J. H. Benton, Jr.*, for Hutchinson.

*J. Lowell*, for Carlisle and Pope.

*H. W. Ogden & M. J. Jordan*, (*S. L. Whipple* with them,) for the plaintiff.

HOLMES, C. J. This is an action of tort for personal injuries caused by the fall of a piece of stone from the capstone of a window in the third story of a brick building. The plaintiff was struck by the stone as he was walking on the sidewalk below the window and was badly hurt. He brought this action against the landlord and tenants of the building. No question of pleading or procedure was raised at the trial, but the landlord, Hutchinson, asked the judge to direct a verdict in his

Digitized by Google

favor. This the judge refused, and instructed the jury that if the defect in the capstone was there before the letting, the landlord was liable unless it was such that human foresight could not reasonably be expected to look out for it. The landlord excepted.

The lease was made on January 10, 1894, for three years from April 1, with a right of extension for two years, which right was exercised by the lessees. The accident was on October 21, 1897. The lessees covenanted in print to keep the premises in such repair as they were in at the beginning of the term, reasonable use and wear and damage by fire or other unavoidable casualties excepted, and further covenanted in writing to do all necessary repairs except to the gravel roof.

On these facts the landlord was not liable for a defect which first came into being after the tenants had taken charge of the premises, and the jury were instructed to that effect. The event shows that at the date of the lease there was no immediate danger, as the accident did not happen until more than three years later. Even if inspection would have disclosed that the capstone would crumble in the course of five years, as of course it would sooner or later, it would be going far to say that the covenant did not reach it, — a question not disposed of by cases like *Lister* v. *Lane*, [1893] 2 Q. B. 212, — and it would be going still further to say that the landlord must be taken to have contemplated the event, or that the tenants, having full control, and, as the plaintiff asserts, the right and duty as towards the public to do what was necessary to make the place safe, were not the only responsible parties. The charge of the judge did not even require knowledge of the defect on the part of the landlord in order to make him liable. *Lowell* v. *Spaulding*, 4 Cush. 277. *Leonard* v. *Storer*, 115 Mass. 86, 88. *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, 49. *Oxford* v. *Leathe*, 165 Mass. 254. *Szathmary* v. *Adams*, 166 Mass. 145, 146. See also *Quinn* v. *Crimmings*, 171 Mass. 255; *Glynn* v. *Central Railroad*, 175 Mass. 510.

But in fact there was no evidence that inspection disclosed or would have disclosed the defect at the time of the lease. The fact that the stone was cracked at the time of the accident is no evidence of its condition five years before, and the fact

Digitized by Google

that the jury took a view, without more, does not raise a presumption that evidence of the long past condition of the stone was obtained by inspection. See *Tully* v. *Fitchburg Railroad*, 134 Mass. 499, 503. *Rigg* v. *Boston, Revere Beach, & Lynn Railroad*, 158 Mass. 309, 313. The suggestion made on behalf of the tenants that sandstone was an improper material for capstones is unsupported by testimony, and is contrary to well known and very general practice. It follows that Hutchinson's exceptions would have to be sustained, were they before us alone.

The tenants, of course, were satisfied with the ruling which made the landlord liable, and so did not except. After the trial the plaintiff moved for judgment against them, which motion was allowed, and the tenants appealed. Assuming that the plaintiff was right in joining landlord and tenants in one action as jointly liable, if liable at all, he had a right to sue the tenants alone, if he saw fit, even if the tort had been joint in the strictest sense. *McAvoy* v. *Wright*, 137 Mass. 207, 210. Dicey, Parties to Actions, 430, Rule 98. So, if the judge had directed a verdict for the landlord, as he should have done, the other defendants could not have excepted, and the plaintiff could have taken a verdict against them. *Warren* v. *Boston & Maine Railroad*, 163 Mass. 484. See *Rodney* v. *Strode*, 3 Mod. 101; *Sabin* v. *Long*, 1 Wils. 30. And so, if after a verdict against all three the plaintiff by leave of the court had discontinued against him, the verdict against the other two would stand. *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, 490. The technical rule that a joint judgment is entire, and if bad as against one is bad against all, has no application to the proceedings before judgment.

The only trouble is that it appears by the argument before us that the plaintiff did not propose to discontinue against the other defendants by his motion. His intention was to take one judgment against the tenants and another against the landlord. That he could not do. *Pickle* v. *Byers*, 16 Ind. 383. *Williams* v. *M'Fall*, 2 S. & R. 280, 281. See *Heydon's case*, 11 Co. 5 a, 5 b. It is true that under the English practice it was held that a plaintiff could declare against one alone in tort when he had sued out process against two or more jointly. *Wilson* v.

Digitized by Google

*Edwards*, 3 B. & C. 734. The reasons are suggested by *Stables* v. *Ashley*, 1 B. & P. 49. *Spencer* v. *Scott*, 1 B. & P. 19. Compare *Chapman* v. *Eland*, 2 New Rep. 82. But that did not mean that he could declare against all the defendants jointly and also against each defendant separately. "An action *partly* joint, and *partly* several, *quoad* the parties liable, being unknown in the law." Gould, Plead. c. 4, § 70; (see § 74.) *McMullin* v. *Church*, 82 Va. 501. *Winslow* v. *Newlan*, 45 Ill. 145, 148. So, *a fortiori*, there could not be a joint and also a separate judgment upon the joint count upon which the verdict must be taken to have been rendered. It has been decided, and rightly we do not doubt, that, in an action of tort, taking judgment against less than all the defendants is a discontinuance as to the others. *Davis* v. *Taylor*, 41 Ill. 405, 408. See *Williams* v. *M'Fall*, 2 S. & R. 280. We are of opinion that the effect of taking the judgment was not diminished by the plaintiff's intention. The court must be presumed to have understood the law, and, so far as its discretion was involved in permitting the plaintiff to discontinue against the landlord, to have exercised it understandingly.

It follows that the defendant Hutchinson is out of the case, and that his exceptions should be dismissed unless there be any cause why he should prefer to have his exceptions sustained and to move in the Superior Court to have the judgment against the tenants set aside, in which case he may take that course at his choice. The ground for such a motion would be that a discontinuance as against him was not to be granted without his consent and without hearing him, at the stage which his case had reached when the judgment was entered.

*Exceptions dismissed and judgment affirmed nisi.*

Digitized by Google

# WILLIAM T. BARKER *vs.* LAWRENCE MANUFACTURING COMPANY.

Middlesex. March 21, 22, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Personal Injuries — Evidence — Witness — View by Jury — Exceptions — Assumption of Risk — Negligence — Due Care.*

A written paper signed before the time of the trial by a person called as a witness and under cross-examination may be put in evidence to show that he had made statements different from his testimony.

In an action for personal injuries occasioned to the plaintiff by falling through a hole in the floor of the room in which he was employed, evidence tending to show that the plaintiff had said, soon after the accident, that he knew that the hole was there, he having testified that he did not know that the floor was taken up at that place, is admissible both as a contradiction and as an admission of his knowledge of the existence of the opening, that knowledge being itself material upon the question whether he was careful or negligent.

It is proper to allow evidence to show, if such a matter is in dispute, how far, if at all, the conditions due to temporary causes at the time of the view by the jury differed from those which existed at the time of the accident.

At the trial of an action for personal injuries a witness for the defendant, who for some years had been in charge of the room in which the accident occurred, was allowed to testify as to whether there would have been steam enough in the room at the time of the accident to obstruct the view of a man of ordinary eyesight. The witness was in the room shortly before and shortly after the accident, but not when it occurred. The bill of exceptions did not disclose enough to show that the matter was not one upon which the opinion of a qualified expert was admissible, nor make it clear that the witness was not so qualified. *Held*, that upon both these matters much must be left to the judge who controls the trial.

If no exception to the course of the presiding judge with respect to a plan is shown by the bill of exceptions to have been taken, and before the plan was allowed to go to the jury it was sworn to by the engineer who made it, no error in dealing with the plan is shown.

A person cannot be allowed to make a contention in this court which the bill of exceptions does not show that he made at the trial.

If, in an action for personal injuries occasioned to the plaintiff by falling through a hole in the floor of the room in which he was employed, the substance of the instruction given as to the assumption of the risk is that if the plaintiff knew that the hole was there, or would have known of it in the exercise of proper care with reference to what was going on there so far as he knew it, he could not recover, and that if he did not know of the opening and would not have known of it in the exercise of proper care, the jury must inquire whether the injury was due solely to some neglect of duty on the defendant's part, the plaintiff has no ground of complaint.

Digitized by Google

TORT, for personal injuries. The declaration was at common law. At the trial in the Superior Court, before *Bond*, J., there was evidence on the part of the plaintiff tending to show that on the day he was injured he was at work about eight o'clock in the morning upon a machine called a soaping machine, leaning forward, and reaching for a bolt used in opening the machine; that the floor on which he stood was wet and slippery; that his foot slipped and he fell into an opening about twenty feet long and several feet wide caused by the taking up of the floor; that he was not informed by any one that the floor was to be taken up, or that it was taken up at the place where he fell; that he did not know that it was taken up at that place; and that the light was such at the place where he was at work, and the steam was so dense, caused by drawing off under the floor the hot water from the soaping machine, that he could not see that the floor was up. There was no fence or guard rail at the opening.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions as to the admission of evidence, which appear in the opinion.

*J. F. Manning*, for the plaintiff.

*G. F. Richardson*, for the defendant, submitted the case on a brief.

BARKER, J. There were five exceptions to the introduction of evidence. The first was to a ruling that a written paper signed before the time of the trial by a person called as a witness by the plaintiff, and under cross-examination, might be put in evidence to show that the witness had made statements different from his testimony. The third and fourth were to the admission of evidence tending to show that the plaintiff had said, soon after the accident, that he knew that the hole into which he fell was there, he having testified that he did not know that the floor was taken up at that place. In each instance the evidence was competent as a contradiction of evidence put in by the plaintiff. Irrespective of any contradiction the evidence of the plaintiff's own statements was competent as his admission of his knowledge of the existence of the opening into which he fell, that knowledge being itself material upon the question whether he was careful or negligent. The fifth exception was to evidence that there was no more steam in the room at the time of the ac-

Digitized by Google

cident than when the view was taken by the jury. It is proper to allow evidence to show, if such a matter is in dispute, how far if at all the conditions due to temporary causes at the time of a view differed from those which existed at the time of the accident; otherwise the view might be misleading. Besides this the evidence was competent to show how much steam was in the room at the time of the accident.

The second exception is to the evidence of the defendant's witness, who had been in charge of the room for some years, as to whether there would have been steam enough in the room at the time of the accident to obstruct the view of a man of ordinary eyesight. The witness was in the room shortly before and shortly after the accident, but not when it occurred. The bill of exceptions does not disclose enough to show that the matter was not one upon which the opinion of a qualified expert was admissible, nor make it clear that the witness was not so qualified. Upon both these matters much must be left to the judge who controls the trial.

There was objection on the part of the plaintiff to the use of a plan by the defendant. No exception to the course of the presiding judge with respect to the plan is shown by the bill to have been taken. Before the plan was allowed to go to the jury it was sworn to by the engineer who made it. If an exception was taken, no error in dealing with the plan is shown.

Before the arguments the plaintiff submitted requests for instructions to be given to the jury, and they were refused. The bill does not state that any exception was taken to this refusal. The whole charge is stated in the bill; but the only exception taken to the charge was at its close, when the plaintiff's counsel excepted to that portion of it relating to the assumption of risk by the plaintiff, claiming that the hole not being in the floor when the plaintiff went to work he did not assume the risk of it.

Notwithstanding the fact that the only exception in connection with the charge was to that part of it which dealt with the question of the plaintiff's assumption of the risk, the plaintiff now contends that his requests for instructions should have been given, and that the charge was incorrect upon the subject of due care and of contributory negligence. No citation of authorities

Digitized by Google

is needed to show that he cannot be allowed to make a contention now which the bill does not show that he made at the trial.

The substance of the instruction given as to the assumption of the risk was that if the plaintiff knew that the hole was there, or would have known of the opening in the exercise of proper care with reference to what was going on there so far as he knew it, he could not recover; and that if he did not know of the opening, and would not have known of it in the exercise of proper care, the jury must inquire whether the injury was due solely to some neglect of duty on the defendant's part. Whether the case properly is to be described in terms of the plaintiff's negligence, or of assumption of the risk, the plaintiff was not injured by the instructions. See *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554, 556, and cases cited; *Whelton* v. *West End Street Railway*, 172 Mass. 555; *Barnard* v. *Schrafft*, 168 Mass. 211. *Exceptions overruled.*

---

EUDORA M. FAXON *vs.* CHARLES A. JONES.

Suffolk. March 22, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Slander — Malice — Evidence — Witness — Cross-examination.*

If, in an action of tort for slander, the plaintiff's testimony would warrant a finding by the jury that the defendant was actuated by express malice in calling the plaintiff a thief, additional damages for the injury to his feelings should be awarded on that account; and it is therefore competent for the defendant to answer "No" to the question "Whether or not you intended to accuse the plaintiff of the crime of stealing?" and the plaintiff having contended that the defendant's language as testified to by him, namely, "If you have got the money in your pocket and do not pay your rent, you are acting like a thief," the defendant being the plaintiff's landlord, was so spoken as to be an insinuation which would be understood as charging the plaintiff with being a thief, the answer is also competent as bearing upon this contention.

In an action of tort for slander, a witness having given testimony favorable to the plaintiff on the question in dispute between the parties as to what the defendant's words were, the defendant's contention being that his language did not constitute a charge of larceny against the plaintiff, but related only to a controversy about the payment of rent, it is competent to ask the witness in cross-examina-

Digitized by Google

tion, as tending to control or modify his testimony in chief, whether he did not understand the epithets used by the defendant towards the plaintiff to relate to the failure to pay rent; and his affirmative answer to this question is a modification of his direct testimony proper for the consideration of the jury.

TORT, for slander and assault. The defendant was the proprietor of the Hotel Huntington, situated on Huntington Avenue in Boston, and the plaintiff occupied as tenant of the defendant certain rooms on the first floor. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.*

*A. H. Latham*, for the plaintiff.

*R. W. Frost*, for the defendant.

KNOWLTON, J. The only questions in this case relate to the admission and exclusion of evidence. The action is for slander and assault. The plaintiff testified that in the presence of numerous persons the defendant stepped up to the plaintiff and shook his clinched fist in her face so near that she was obliged to withdraw her head a little in order to avoid being hit, and said to the plaintiff aloud, and in an angry tone, "You are a thief! you are a thief! you are a thief!" The defendant's account of the transaction was that the plaintiff was in arrears for rent of her rooms, and that when he spoke to her about it she said she had the money in her pocket and could pay at any time she wished, and that thereupon he said, "If you have got the money in your pocket and do not pay your rent, you are acting like a thief," and that this was all that he said. He also testified "that he did n't shake his clinched fist in the plaintiff's face, or anything like it." Against the plaintiff's objection, and subject to her exception, he was then permitted to answer "No" to the question, "Whether or not you intended to accuse Mrs. Faxon of the crime of stealing?"

It has been expressly adjudged in this Commonwealth that because a libel or a slander involves an injury to the feelings of the plaintiff, as well as to his reputation, his injury may be greater if the defamatory words are uttered with express malice than if there is only the malice which the law implies from

* For another decision growing out of the same transaction, see *Faxon* v. *Jones*, *ante*, 138.

Digitized by Google

intentionally doing, without justification, that which in its natural tendency is injurious. *Markham* v. *Russell*, 12 Allen, 573. "The jury have the right to consider the mental suffering of the plaintiff, up to the time of the trial, caused by the publication of these slanderous words." Morton, C. J., in *Marble* v. *Chapin*, 132 Mass. 225, 226. This suffering may be enhanced by knowledge of the malicious purpose of the slanderer, and this aggravation of the mental suffering of the plaintiff does not depend upon the effect produced by the words or manner of the defendant upon the persons to whom the slander or libel was published. The effect upon the plaintiff's reputation might be less in the estimation of the hearers if the defendant seemed to be actuated by malice than if he spoke with seeming candor. This kind of suffering comes from the disturbance of the plaintiff's feelings from the knowledge or belief that the defendant was actuated by express malice, however this knowledge or belief is derived. It matters not whether a plaintiff knows beforehand that the defendant cherishes a wicked purpose to cause him suffering, or whether he discovers it afterward. If at any time it comes to his knowledge that his enemy sought pleasure and satisfaction in deliberately doing him a grievous wrong, his indignation and pain caused by such knowledge ought to be paid for by the wrongdoer. Accordingly, evidence of previous or subsequent declarations or conduct of the defendant, as well as of his conduct and language at the time of the slander, is received for the purpose of proving express malice in aggravation of damages. *Baldwin* v. *Soule*, 6 Gray, 321. *Markham* v. *Russell*, 12 Allen, 573. *Robbins* v. *Fletcher*, 101 Mass. 115. *Clark* v. *Brown*, 116 Mass. 504. *Hastings* v. *Stetson*, 130 Mass. 76, 78. *Pearson* v. *Lemaitre*, 5 M. & G. 701. *Symonds* v. *Carter*, 32 N. H. 458. Odgers, Libel & Slander, (1st Am. ed.) 296. 13 Am. & Eng. Encyc. of Law, 438 and cases cited. See *Commonwealth* v. *Harmon*, 2 Gray, 289, 293; *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238.

The plaintiff's testimony would warrant a finding by the jury that the defendant was actuated by express malice, and that additional damages for the injury to her feelings should be awarded on that account. It was, therefore, competent for the defendant to introduce evidence that he had no hostile feelings

Digitized by Google

towards the plaintiff; and it well may be contended that his testimony that he did not intend to accuse her of stealing was competent upon this issue. Whenever one's actual feelings or intentions are in issue, as distinguished from his manifestation of them, he may testify directly upon that point. *Lombard* v. *Oliver*, 7 Allen, 155. *Snow* v. *Paine*, 114 Mass. 520, 526. *Nash* v. *Minnesota Title Ins. & Trust Co.* 163 Mass. 574, 580.

The plaintiff also seems to have contended that the defendant's language as testified to by him was so spoken as to be an insinuation which would be understood as charging the plaintiff with being a thief. The judge admitted the answer as bearing upon this contention. We are of opinion that the evidence was competent. The witness Grace had given testimony favorable to the plaintiff on the question in dispute between the parties as to what the defendant's words were. The defendant's contention being that his language did not constitute a charge of larceny against the plaintiff, but related only to a controversy about the payment of rent, it was competent to ask the witness in cross-examination, as tending to control or modify his testimony in chief, whether he did not understand the epithets used by the defendant towards the plaintiff to relate to the failure to pay rent. His affirmative answer to this question was a modification of his direct testimony, proper for the consideration of the jury.

The evidence offered by the plaintiff and excluded pertained only to the question of damages, and the finding for the defendant makes it immaterial.

*Exceptions overruled.*



Digitized by Google

# WILLIAM H. LINCOLN & another *vs.* BOARD OF STREET COMMISSIONERS OF THE CITY OF BOSTON.

Suffolk. March 22, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Betterments — Entire Assessment for Different Elements in one Scheme of Improvement — Assessment of Special Benefits without Assessment of Public Benefits — Constitutional Law — Evidence — Certiorari — Statute.*

In assessing betterments under St. 1893, c. 339, and St. 1894, c. 439, upon abutters on a public way for special benefits received by them from its construction, such construction, the laying of sewers and connections, and the establishment of building lines may be considered as one improvement, and the entire cost set off against the benefit thereof.

At the hearing upon a petition for a writ of certiorari to quash the assessment of betterments for the laying out of a public way under St. 1893, c. 339, and St. 1894, c. 439, which did not confine the assessment to abutters, evidence that the value of estates near the end of the way was increased by having a shorter and pleasanter route to important points, and was increased much more than that of remoter estates, is inadmissible if the omission to assess such estates was not due to a mistake of law, or if the alleged benefits were not special and peculiar within the meaning of the statutes.

The St. 1893, c. 339, providing for the construction of Boylston Street, in the city of Boston, and the assessment of betterments for the cost thereof, is constitutional, and under it special benefits may be assessed without assessing public or general benefits.

The provision of St. 1893, c. 339, § 2, that in determining the cost of the construction of a certain way in B., "the expenses for gas pipes, water pipes, their connections, and the laying thereof," are to be excluded, and a proportional share of the cost is to be assessed upon the real estate which it is adjudged "receives any benefit and advantage from such laying out, construction, and laying of sewers and pipes as aforesaid, beyond the general advantages to all real estate" in B. to the extent of the total amount of such adjudged benefit and advantage, merely indicates in general terms the benefits to be assessed for, and does not intend an improper enhancement of, estimated benefits by the use of the word "pipes," which, if of any importance, is satisfied by the water pipes which are laid by the city.

An assessment of betterments for the construction of a way may be erroneous if not laid upon estates liable thereto by reason of the adoption of a mistaken principle of law, but not by reason of a mistaken finding of fact that such estates were not specially benefited.

PETITION for a writ of certiorari to quash an assessment for betterments made under St. 1893, c. 339, and St. 1894, c. 439, for the construction of Boylston Street, a public way in the city

Digitized by Google

of Boston. Hearing before *Knowlton*, J., who was of opinion that the petition should be dismissed, but, at the request of the petitioners, reported the case for the consideration of the full court. The material facts appear in the opinion.

*H. Winn*, for the petitioners.

*T. M. Babson*, for the respondent.

HOLMES, C. J. This is a petition for a writ of certiorari to quash an assessment for betterments made under St. 1893, c. 339, and St. 1894, c. 439. Under these acts the street commissioners of Boston constructed a portion of Boylston Street, with sewers, and established building lines outside of and parallel with the lines of the highway. They assessed upon the abutters, and no others, so much of the cost of the whole work (subject to the exceptions mentioned in § 2 of the act of 1893) as was equal to what they adjudged to be the total special benefits received, and in estimating the special benefits they took the whole improvement as one, instead of separating the items and setting the cost of the sewer against the benefit of the sewer, the cost of the building lines against the benefit of the building lines, and the cost of the street against the benefit of the street, alone. This is one ground upon which the assessment is attacked.

Another ground is that the commissioners confined the assessment to abutters, although the statute of 1893 did not, and that other estates not abutting on the way were benefited specially. In support of this allegation proof was offered at the hearing that the value of estates near the end of Boylston Street was increased by having a shorter and more pleasant avenue to important points, and was increased much more than that of more remote estates. The evidence was rejected, the judge ruling that the alleged benefits were not special and peculiar within the meaning of the statute, and also that the omission of estates which ought to have been assessed could not be shown upon certiorari, unless, which did not appear, the omission occurred through a mistake of law and not through a mistake of fact.

It is objected further that to make the assessment proportional a valuation should have been set upon the public benefit, or at least upon the benefit to all Boston real estate as well as

Digitized by Google

upon the special benefits to individuals, and both should have been assessed equally. The statute itself is attacked as imposing a disproportionate tax.

The first objection goes to the course adopted by the commissioners in considering the benefits from the whole improvement as one. The assessment cannot exceed the special benefit, (*Norwood* v. *Baker*, 172 U. S. 269. *Sears* v. *Boston*, 173 Mass. 71, 78,) and therefore in determining what the petitioners can be called on to pay it may make a great difference if an item which cost but little, but added much to the value of their estate, can be lumped with another of which the cost was large but the benefit small. Still "the question was as to the benefit to the petitioner's land by the whole construction of the street." *Alden* v. *Springfield*, 121 Mass. 27, 28. The statute seems to contemplate the course which was adopted, so that strictly the question would be, perhaps, whether the statute could not authorize it. But if we assume the statute to be neutral, the question is whether it can be said as matter of law that the commissioners were not warranted in finding street, sewer, and building lines all to be portions of one improvement. We are of opinion that they were warranted in their finding. The different elements are combined in the unity of a single though complex design. A sewer is one of the recognized incidents of a way, although it serves a different purpose from that of the pavement; just as a chimney is part of a house, although it serves a different end from that of the roof or walls. The right to lay sewers is paid for when a way is laid out although not specially mentioned in the taking. *Lincoln* v. *Commonwealth*, 164 Mass. 1, 10.

Next as to the refusal to receive evidence that other estates beside those of abutters were benefited by having a shorter and more pleasant way to central points. The statute did not limit the assessment to abutters. It allowed lands specially benefited to be assessed "whether situated on said street or otherwise." St. 1893, c. 339, § 2. This being so, the petitioners say that they are entitled to be heard at some time on the question whether others should not have been called on to contribute and so to lighten the petitioners' burden. We must take this contention with the petitioners' offer of evidence. If any

Digitized by Google

amendment were necessary to give the respondent the advantage of the actual state of facts as shown by that offer, it would be allowed as of course. But the benefits which the petitioners offered to prove were those common to all lands in the vicinity, and these, it is settled, are not to be regarded as special. *Parks* v. *Hampden*, 120 Mass. 395. *Hilbourne* v. *Suffolk*, 120 Mass. 393, 394. *Cross* v. *Plymouth*, 125 Mass. 557, 558. *Abbott* v. *Cottage City*, 143 Mass. 521, 526. *Smith* v. *Boston*, 7 Cush. 254. *Stanwood* v. *Malden*, 157 Mass. 17. *Dorgan* v. *Boston*, 12 Allen, 223, 234. *Jones* v. *Boston*, 104 Mass. 461, 469. *Benton* v. *Brookline*, 151 Mass. 250, 260.

All these last cited cases start from *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291, 297, 298, and it is said that this distinction between special and general benefits had its beginning in a mere rule of damages for determining the sum to be deducted from the amount to be paid when land was taken for a public improvement. It is argued that constitutional difficulties have no place in a case of that sort, but arise only when the special benefits are made the subject of an assessment. A suggestion that the deduction of benefits may be referred to the right of eminent domain will be found in *Harvard College* v. *Boston*, 104 Mass. 470, 490, 491. See *Sears* v. *Boston*, 173 Mass. 71, 76. The distinctions of constitutional law must be pretty technical if taking a man's money is unlawful in the latter case and is not equally so in the former. It may be that the line between special and general benefits is fixed by a somewhat rough estimate of differences. But all legal lines are more or less arbitrary as to the precise place of their incidence, although the distinctions of which they are the inevitable outcome are plain and undeniable. This one we regard as sanctioned by legislation and judicial determination.

In what we have said last we have approached the grounds on which the statute is argued to be unconstitutional. The petitioners say that if there is a benefit to other estates in the neighborhood, or to all the land in Boston, or to the public generally, no matter how you distinguish it from that received by the petitioners' land, they are entitled to have those benefits share proportionately with their own in the expense. They deny that their special benefits can be assessed before calling on

Digitized by Google

the others. Notwithstanding the effort of their counsel in his able and ingenious argument to distinguish the case, we must regard the whole contention as disposed of by *Dorgan* v. *Boston*, 12 Allen, 223. It is suggested that we are to take the decision as assuming merely such a minimum public benefit as would justify the exercise of the right of eminent domain; but this seems to us excluded when it is said, although in a different connection, that the Legislature deemed the work to be "so essential to common convenience as to warrant them in authorizing its execution in a certain contingency at the common expense." 12 Allen, 242.

This disposes of the claim to contribution in respect of the public benefit, and we think that the court had the general benefit to real estate in the neighborhood no less clearly in mind, when, after having earlier referred to "the well established rule as recognized in *Meacham* v. *Fitchburg Railroad*," it laid down its conclusion that "taxes levied for public purposes of a local character are not unconstitutional, as being unreasonable and unproportional, solely because they are imposed only . . . on persons residing or owning property in a particular locality, and that an assessment made on persons in respect of their ownership of certain property which receives a peculiar benefit from the expenditure of the money raised by a tax, or by reason of their residence in the vicinity of a proposed public improvement, and the special advantage or convenience which will accrue to them and their property therefrom, will not be held invalid, although it does not operate on all persons and property in the community in the same manner as taxes levied for general purposes." The argument for the petitioners cuts at the root of all betterment assessments upon abutters, because in almost every case there must be a public benefit and some general benefit to other land in the neighborhood which are neglected in the assessment. We should be slow to believe that anything in *Norwood* v. *Baker*, 172 U. S. 269, or in any other authoritative decision threw doubt on the validity of such assessments on the ground supposed, provided they did not exceed the special benefits to the estates concerned. See further *Springfield* v. *Gay*, 12 Allen, 612, 615, 616; *Jones* v. *Boston*, 104 Mass. 461; *Harvard College* v. *Boston*, 104 Mass.

Digitized by Google

470, 486, 487; *Prince* v. *Boston*, 111 Mass. 226; *Boston Seamen's Friend Society* v. *Boston*, 116 Mass. 181, 183.

A subordinate objection taken to the act of 1893 needs a word. The board in determining the cost of the work is to exclude "the expenses for gas pipes, water pipes, their connections and the laying thereof," but is to assess a proportional share of the cost upon the real estate "which said board shall adjudge receives any benefit and advantage from such laying out, construction, and laying of sewers and pipes as aforesaid, beyond the general advantages to all real estate in such city, to the extent of the total amount of such adjudged benefit and advantage," c. 339, § 2. It is urged that the benefit of the gas pipes cannot be treated as part of the benefit conferred by the laying out of the street, that it is a benefit paid for and furnished by a private company. Our answer is that the statute here is merely indicating in general terms the benefits to be assessed for, not precisely describing the elements and laying down a legal rule for assessments; that there was not intended or expected by the insertion of the word "pipes" any improper enhancement of the estimated benefits; that the word "pipes," if of any importance, is satisfied by water pipes which are laid by the city; and that the board seems from its return to have considered only the benefits of the laying out and construction of the streets, the laying out of sewers and the establishment of building lines, and that that is all that the statute meant it to do.

Although it is not necessary, we recur to the ruling of the justice at the hearing. A second ground on which the evidence offered was rejected was that it was not admissible on certiorari. That is in accordance with the well understood rule. *Prince* v. *Boston*, 111 Mass. 226, 232. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206. It is argued from *Butler* v. *Worcester*, 112 Mass. 541, 556, *Kelso* v. *Boston*, 120 Mass. 297, 299, and *County Commissioners, petitioners*, 143 Mass. 424, 431, that if not admissible on certiorari it would not be admissible at all. We do not so understand those cases. The first two only decide that you cannot show an assessment to be void for the omission of proper parties in an action to recover a sum paid under protest. They say that an error of

Digitized by Google

omission may be remedied on certiorari. *LeRoy* v. *York*, 20 Johns. 430, the only one of the cases cited by Chief Justice Gray in the earlier decision needing notice, shows that he had in mind a case where the record disclosed an omission of estates standing like the petitioners', and omitted because of the adoption of a mistaken principle. The error was broader and more fundamental than a mistaken finding that this or that piece of land was not specially benefited. A mistaken finding upon that point would not invalidate the assessment. See *North Reading* v. *County Commissioners*, 7 Gray, 109, 112, 113, and *Whiting* v. *Boston*, 106 Mass. 89, 99. *Prince* v. *Boston* and *County Commissioners*, *petitioners*, show that, so far as necessary to fix the amount due from the petitioners, the matter can be gone into before the jury, if a jury is asked for to revise the assessment. See also *Whiting* v. *Boston*, 106 Mass. 89, 97. But we repeat that the offer would have to go further than the one made to give the petitioners a right to put in the evidence anywhere. *Petition dismissed.*

---

JOHN M. MARSHALL, executor, *vs.* HATTIE S. MASON.

Middlesex. March 22, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Will — Witnesses.*

Witnesses to a will must sign after the testator has signed.

APPEAL, from a decree of the Judge of Probate, allowing an instrument as the will of Mary Caroline Mason and disallowing two later instruments, each of which the witnesses signed first in the presence of the testatrix, she signing immediately afterwards in their presence. Hearing before *Barker*, J., who reported the case for the determination of the full court.

*G. R. Pulsifer*, for the appellant.

*J. M. Marshall & H. W. Brown*, for the appellee.

HOLMES, C. J. The only question with which we need to deal upon this report is whether an instrument is duly executed

Digitized by Google

as a will under our statutes if the witnesses sign first in the presence of the testator and the testator signs immediately afterwards in their presence, the whole transaction being as completely one as it can be with that order of events. The question has been answered so fully by Mr. Justice Gray in delivering the judgment of this court in *Chase* v. *Kittredge*, 11 Allen, 49, 56, 63, 64, that we think discussion unnecessary. "The manifest intention of the statute is that, 1st, the will should be put in writing and signed by the testator; 2d, his will so written be attested by the witnesses; and 3d, the witnesses subscribe in his presence in evidence of their attestation to his written will." It is true that in that case the witness in question signed in the absence of the testator and some time before him. But the Chief Justice does not confine his reasoning to that case, and evidently meant, with the concurrence of his brethren, to establish a general rule in the words which we have quoted. We regard that rule as founded on good sense and the plain meaning of the words of the statute. Many of the cases cited at the present argument are cited in the opinion. Others in accord with it are *Jackson* v. *Jackson*, 39 N. Y. 153, 162; *Sisters of Charity of St. Vincent de Paul* v. *Kelly*, 67 N. Y. 409, 413; *Brooks* v. *Woodson*, 87 Ga. 379. See also *Mendell* v. *Dunbar*, 169 Mass. 74, 76. *Decree of Probate Court affirmed.*

---

## MINNIE A. SMITH *vs.* PAUL BOYTON COMPANY.

Suffolk. March 22, 23, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Personal Injuries — Admissions in Statements required by Law — Admissions in Former Action.*

At the trial of an action against a foreign corporation for damages for personal injuries sustained by the plaintiff while participating in a sport at certain amusement grounds alleged to be operated and controlled by the defendant, a certified copy of an application by it for a license from the board of aldermen for the entertainments at such amusement grounds, a certified copy of the certificate of the defendant under St. 1884, c. 330, which referred to such amusement grounds as its

Digitized by Google

usual place of business, both made before the action was commenced, and a certified copy of a return of the defendant under St. 1891, c. 341, made after action brought, giving such amusement grounds as its post-office address, all purporting to be signed either by the defendant or by its officers, are competent in connection with the fact that the defendant's name was painted over the entrance to the grounds, and other evidence, for the purpose of showing that it operated and controlled such grounds.

If, at the trial of an action against the P. B. Company, a foreign corporation, for damages for personal injuries sustained by the plaintiff at certain amusement grounds alleged to be operated and controlled by the defendant, the defendant introduced testimony tending to show that it had never done business at the place in question, and that the place was in fact under the control and management of another foreign corporation, which used therewith the name "P. B. Company" without authority from the defendant solely because it was a popular name, evidence is admissible, in rebuttal, of the records of an earlier action against the same defendant to recover damages for personal injuries sustained by another person at the same grounds, which shows that by a petition signed "P. B. Company by H. Manager," the defendant sought a reduction of an attachment of its property, that by its answer it alleged that it was the proprietor of those grounds, and that judgment was entered against it.

At the trial of an action against the P. B. Company, a foreign corporation, for damages for personal injuries sustained by the plaintiff while participating in a sport at certain amusement grounds alleged to be operated and controlled by the defendant, evidence that the defendant's name was painted over the entrance, and that three written instruments made by the defendant as required by law purported to connect it with the business as proprietor, is to be weighed in connection with testimony that the sport in which the plaintiff was engaged when injured was one for which the G. and H. Company was alone responsible, as well as in connection with a contract between the defendant and the G. and H. Company, by which the latter was to construct and equip the whole enterprise, reimburse itself for advances from the receipts from the grounds, and thereafter own the enterprise jointly with the defendant; and requests for rulings that upon all the evidence the action could not be maintained, and that there was no evidence that the contract between the defendant and the G. and H. Company was fraudulent or colorable or otherwise than *bona fide*, were properly refused.

TORT, for personal injuries sustained by the plaintiff while participating in a sport at the amusement ground of the defendant. Writ dated September 1, 1897. Answer, a general denial. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The material facts appear in the opinion and in a note by the reporter.

*R. W. Frost*, for the defendant.

*L. G. Blair*, for the plaintiff.

BARKER, J. The plaintiff visited an enclosure known as an "amusement ground," to which the payment of a fee gave her admission, an additional sum being payable for each sport in

Digitized by Google

which she there engaged. She was in the exercise of due care, and the cause of her injury was the negligence of the attendants in charge of a sport in which she was participating when hurt. The contention of the defendant corporation was that it was not in charge or control of the appliance and had nothing to do with its operation.

The defendant's name was painted over the entrance to the grounds. Aside from the evidence of this fact, all the other evidence introduced by the plaintiff charging the defendant with the management of the grounds was admitted, subject to the defendant's exception. Among the evidence thus admitted were certified copies of three written instruments, two of which purported to be acts of the defendant corporation, and the other to be the act of the president, treasurer, secretary, and a majority of its directors. The one last mentioned bore the earliest date, July 1, 1896, and was a certificate under St. 1884, c. 330, "Concerning foreign corporations having a usual place of business in this Commonwealth," purporting to state the facts concerning the Paul Boyton Company, an Illinois corporation, required to be stated by that statute.

The second instrument was dated July 15, 1897, and purported to be an application of the Paul Boyton Company to the board of aldermen of the city for a license. The third bore date April 27, 1898, and purported to be the return of the Paul Boyton Company, as an Illinois corporation, as of the first day of the preceding March, in compliance with the provisions of St. 1891, c. 341, "An Act concerning foreign corporations having a usual place of business in this Commonwealth." The "amusement grounds" referred to in these instruments was the place where the plaintiff was hurt. The first referred to them as the usual place of business of the corporation, and the place where notice and copies of legal process should be addressed; the second asked for a license for the entertainments there; and the third gave the same place as the post office address of the company, and as its usual place of business in the summer season. The certified copies of these instruments were admitted without other proof as to who signed them, or as to the authority of the persons so signing, than appeared from the copies themselves, except that a witness, Wallace E. Hyde, called for the defendant, testified that the words

Digitized by Google

"Paul Boyton Company by Wallace E. Hyde Manager" were signed by him to the application for license.

1. The copies were admitted rightly. The writ was dated September 1, 1897, and alleged that the defendant was a corporation duly established by law and having a usual place of business in the city of Boston. The instruments were acts which were required by law to be performed by the defendant, if it was a foreign corporation and engaged in business at the place where the plaintiff received her injury. There was no answer in abatement. The fact that the words "Paul Boyton Company" were painted over the entrance to the grounds, admitted in evidence without objection, tended to show that the grounds were the place of business of a concern having the name alleged in the writ to be the corporate name of the defendant. The presumption that a certain name is borne and used by but one party made it right to infer that the instruments related to the defendant, and the fact that they purported to be made and filed in pursuance of law made it right to infer, from the copies themselves, that the instruments were genuine, and were acts of the defendant, relevant to the issues upon trial, and so admissible in evidence against it.

2. The exception to the question asked in cross-examination of a witness called by the defendant is not argued, and we treat it as waived.*

3. The defendant introduced the testimony of Wallace E. Hyde tending to show that it had never done business at the place in question, and that the place was in fact under the control and management of another foreign corporation which used therewith the name "Paul Boyton Company," without authority from the defendant, solely because it was a popular name. Thereupon the plaintiff was allowed to put in evidence in rebuttal the record of an action in the Superior Court against the defendant in this case, to recover against it damages for a personal injury alleged to have been sustained by a visitor to the same grounds,

* The question was: "Don't you know, as matter of fact, that the Paul Boyton Company claims, Mr. Hyde, to control what I call the chutes?" The defendant excepted on the ground that the question of the control of the chutes two years after the accident was immaterial. The question was allowed, and the witness answered in the negative.

Digitized by Google

in which action the defendant by a petition signed "Paul Boyton Company by Wallace E. Hyde Manager" had petitioned for a reduction of an attachment made therein of its property. The record also showed that the answer filed in the case and signed by the defendant's attorney alleged that it was the proprietor of the place of amusement, and that if the plaintiff therein was hurt it was through his own negligence, and also that judgment had been entered in the case for the plaintiff for damages and costs.

It is contended in support of the exception to the admission of this record that it should have been offered in chief, if at all; that it does not appear when the transactions which the record tended to prove took place; and that the answer was not competent, under the decision in *Dennie* v. *Williams*, 135 Mass. 28. But the order of evidence is within the discretion of the trial court, as also is the question whether matters of which evidence is offered are too remote in point of time. There was no request to withdraw that part of the record which disclosed the tenor of the answer signed by counsel from the consideration of the jury. The record was competent so far as it tended, aside from the statements of the answer, to prove that the defendant had acted concerning the place of amusement in a manner inconsistent with its contention at the trial, that it had no connection whatever with the grounds or the business there conducted. As no specific instructions were asked as to the answer, the question whether its statements were competent as admissions of the defendant is not now open, and we express no opinion upon it.

4. The request for an instruction that upon all the evidence the plaintiff could not maintain her action, was rightly refused. The keeping of the defendant's name over the entrance, and the statements of the three instruments which purported to connect it with the business as proprietor, were to be weighed with the testimony of the witness who testified that the special sport in which the plaintiff was engaged when hurt was one for which a third person was alone responsible, and that the management and control of the grounds belonged in fact to the Grace and Hyde Company, and with the contract between that company and the defendant, a copy of which was put in by the latter. The contract required the Grace and Hyde Company to construct, equip,

Digitized by Google

and complete the whole enterprise by May 1, 1896, and contemplated the reimbursement of the company for its advances by the receipts from the grounds within four months after they should be opened to the public, and provided for an association thereafter of the two corporations in the permanent conduct and management of the enterprise, so that every valuable thing pertaining to it should be owned and the use and income from it enjoyed jointly by the two.

If it was not a colorable contract it tended to prove such a connection of the defendant with the business as to make it responsible in an action of tort for negligence. In such an action the plaintiff could hold any one of several responsible parties. Besides this, the jury could believe or disbelieve the testimony that the particular sport in which the plaintiff was hurt was wholly owned and controlled by a stranger. Their finding against the defendant was justified by the evidence.

5. The exception to the refusal to give, at the close of the charge, the instruction that there was no evidence that the contract between the Grace and Hyde Company and the defendant was fraudulent or colorable or otherwise than *bona fide*, must be overruled. By the terms of the contract, the defendant, in whose name the enterprise was conducted, was its chief owner. The testimony that the defendant had no real share in the management or control, and that its name was used by the Grace and Hyde Company instead of its own merely because it was a more popular name, was enough to raise a question whether the contract was not colorable.

*Exceptions overruled.*

Digitized by Google

## FRANCES G. BRIGHAM, petitioner.

Suffolk. March 23, 26, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Petition to set aside a Decree of Divorce after Death of the other Party — Laches — Lack of Due Diligence.*

**Assuming that a petition to set aside a decree of divorce for adultery of the petitioner, brought against the executor of the petitioner's husband, ever could be maintained on the ground of the suppression of evidence by the fraud and collusion of the husband with the petitioner, if her collusion is caused by duress, threats, violence, and pecuniary temptation, her unreasonable delay in bringing the petition puts an end to her rights.**

PETITION, to set aside a decree of divorce for adultery of the petitioner, brought against the executors of the will of the petitioner's husband, Robert B. Brigham, and his next of kin and sole heirs at law. The executors demurred to the petition, assigning, among other grounds therefor, laches and lack of due diligence in bringing the petition. Hearing before *Hammond*, J., who reserved the case upon the demurrer for the consideration of the full court. The facts appear in the opinion.

*L. S. Dabney*, (*H. M. Burton* with him,) for the executors and next of kin of Robert B. Brigham.

*G. Putnam & C. A. Snow*, (*W. W. Gooch* with them,) for the petitioner.

HOLMES, C. J. The petition in this case was reserved for our consideration upon the executors' demurrer. The petition is very long and contains much irrelevant matter. The more important allegations are as follows. The libel against the petitioner was filed on March 2, 1885. It was served upon her in her husband's house, where she was living, and thereupon she left him and fixed her residence in New York. In April she answered and filed a cross-libel. If the facts had been brought before the court, the petitioner, irrespective of the truth of the charge against her, which she denies, would have been able to prove extreme cruelty and connivance. Up to November 19, 1885, she intended to fight. But her husband played upon the fears

Digitized by Google

of one Bates, who was the plaintiff's confidential adviser, and who was said by the husband to have committed adultery with her, and played also upon the plaintiff's fears for her support, with such effect, that she was induced by her husband and Bates to agree to take $10,000, and to agree, upon that consideration, to allow him to get his divorce. Pursuant to this scheme she signed some agreements and instructed her counsel not to appear in the divorce suit, and a check for $10,000 was put in escrow to be delivered to her upon the passing of the decree. By an amendment it is alleged that her signatures were procured by force and violence exercised by Bates acting in collusion with her husband, and that her consent throughout was procured by "duress, violence and threats practised upon her by" Bates acting in the same collusion.

This amendment was filed only six days after the petition, and does not purport to override the previous allegations. It leaves the petitioner's collusion a voluntary act, upon motives. See *Fairbanks* v. *Snow*, 145 Mass. 153, 154. It merely adds to the motive of desire for the promised money and fear for her support, coupled with the efforts of Bates "to induce" the petitioner to assent, the further motive of duress on the part of Bates by threats and violence, — threats of what, and violence of what kind is not stated, but it must be assumed of a kind consistent with persuasion.

On May 20, 1886, the petitioner was defaulted in the divorce suit, and depositions were laid before the judge, who entered a decree *nisi* on May 22. On November 20, 1886, the petitioner was so far free from any undue influence that she filed petitions in the divorce suit setting up her collusion, reaffirming her answer and cross-libel, and asking that the decree *nisi* and the dismissal of her cross-libel be set aside. She remained free until November 1, 1888, but did nothing further. At that time, her husband having repudiated the ten thousand dollar arrangement and having got back the check, she was in distress for money. Bates, frightened by a threat on the part of her husband to publish the evidence against the petitioner and him, and colluding with her husband, advised and induced her not to proceed with her petitions. At the same time her husband added threats of an indictment for perjury if she should deny

Digitized by Google

the charge of adultery in testimony, and offered her $5,000 if she would consent to the decree being made absolute, which consent, it is said, was obtained through the duress and undue influence of Bates colluding as aforesaid. This money she seems to have received, and under the influences stated she remained in New York and instructed her counsel not to appear at the trial of the case on November 7. By another part of the above mentioned amendment it is alleged that her signatures to some of the instructions were forged, and that her genuine signatures, if any, were compelled by the threats and duress already mentioned. At this point again it will be perceived that although the words "duress" and "undue influence" are used, the elements of pressure were all appeals to motives, and that the duress was not of so absolute a nature as to exclude the payment of money. So far as appears she knew Bates's motives for taking the part which he took in the affair.

The petitioner not appearing, her petitions were dismissed, and the decree *nisi* was made absolute — it is alleged, without a hearing, but according to the record of the earlier proceedings, which was laid before us by agreement, after a hearing on the petitions.

The conditions stated, which constituted the duress, or, as it is amended, a great part of the duress, under which she directed her counsel not to prosecute her petition, continued until the death of Bates at a time not stated, but, it appears, before, and, it would seem, a considerable time before, the death of her husband. Her husband died on January 2, 1900. The petitioner, being advised by counsel that on the facts she could claim the rights of a widow in her husband's estate, did nothing until he died, and then filed this petition. She alleges that while he lived his great wealth could be used to shut off evidence to prove her case, that premature action probably would have led to the destruction of evidence, and that since his death she for the first time became able to prove the allegations of this petition.

We have stated the substance of the petition because the statement seems to us enough to show that it ought not to be maintained. If such a petition can be maintained under any circumstances, obviously it must be scrutinized with the greatest



Digitized by Google

suspicion and jealousy to prevent opening a door to fraud. In this case, whatever sinister influences brought about the petitioner's consent to the decree *nisi*, she was free from them for two years, and brought them to the attention of the court on the record. Therefore they may be laid out of the case. Then for two years she neglected to take a step. Then, according to her account, she was bribed and frightened into a second default. But the court when it made the decree absolute had notice, and in every probability had actual knowledge, of her charge of collusion, now renewed. If the case stopped there, she has had her day in court, and it would be a strong thing to reopen matters which have been in issue and which she has had a chance to try. See *Gale* v. *Nickerson*, 144 Mass. 415, 419; *United States* v. *Throckmorton*, 98 U. S. 61.

But the case does not stop there. By the death of Bates all the so called duress was removed. Then it was her business and duty to move at once. Instead of that she waited, and it is implied, if not admitted, that she waited for the death of her husband.

It is very clear that divorce proceedings generally are ended by the death of a party. They are conspicuous examples of those personal actions which die with the person. To state the same result from a different point of view, in general, an executor does not represent his testator for the purposes of a matrimonial cause. *Stanhope* v. *Stanhope*, 11 P. D. 103, 106, 107, 109, 110. Whether there is an exception where it is sought to set aside a decree of divorce on the ground that it was obtained by the fraud of the deceased party, we have not found it necessary to consider, and we express no opinion. ⟨If there is such an exception, the further question remains whether, as seems to have been held in one or two American decisions, it extends beyond cases in which the fraud went to the jurisdiction of the court.⟩ This also we leave untouched.

Assuming the exception to exist, it would be carrying it a great way if it was extended to a case where the whole ground of the application to vacate the decree is the plaintiff's own collusion on the merits. The jurisdiction in this case was undoubted and complete. Of course collusion of the kind narrated does not make the decree void, as is sufficiently shown by

Digitized by Google

the present petition to set it aside. *Greene* v. *Greene*, 2 Gray, 361. *Thomas* v. *Beals*, 154 Mass. 51, 53. *Miltimore* v. *Miltimore*, 40 Penn. St. 151, 155. Action on the part of the court is necessary to annul the decree. Such action the court would not take of its own motion, so that the question necessarily arises as to the merits of the party who asks it to act. The question is whether the plaintiff can get a *locus standi* from her own fraud upon the court. It is very clear that she could not, unless the fact that her husband improperly created some or all of her motives for colluding with him makes a difference. *Greene* v. *Greene*, 2 Gray, 361, 362. *Edson* v. *Edson*, 108 Mass. 590, 598. *Miltimore* v. *Miltimore*, 40 Penn. St. 151, 156. *Nichols* v. *Nichols*, 10 C. E. Green, 60, 65. *Kinnier* v. *Kinnier*, 45 N. Y. 535, 542. *Simons* v. *Simons*, 47 Mich. 253.

Whether the part alleged to have been played by the husband does make a difference is another question that we shall not decide. Clearly it would not be enough to allege that her husband offered her money and she took it. It would not be enough to allege that her husband used pressure to induce her friend and adviser to advise her to take money and settle. We leave it undecided whether the word "duress" turns the scale, when shown, as it is shown here by the context, not to mean absolute domination through well founded fear of violence, or through fear alone on any other ground. According to the petition the petitioner acted under a pressure produced by an appeal to her need for money (not created by the husband), to her fear of indictment for perjury if she testified to what she alleges to be the truth, to her or her friend Bates's fear of publicity, as well as by any fear of violence there may have been. The proportion of the different elements is left wholly indeterminate. *Miltimore* v. *Miltimore*, 40 Penn. St. 151, 156. It hardly would be too much to say that her want of money may have been the chief motive for her consent.

The counsel for the petitioner do not put her case as one of duress by violence or threats of violence. They recognize it as one of mixed motives in which money played a part, and in which the fear was mainly fear of scandal and of being indicted for telling the truth. But they say that the conduct of the parties was collusion none the less, and when brought to the

Digitized by Google

attention of the court would have prevented a decree, *Churchward* v. *Churchward*, [1895] Prob. 7, and ought to vacate one. We may assume that if it had been proved when it ought to have been, by a person competent to prove it, it would have prevented a decree; but it would seem that in England it would not have prevented a new proceeding, (ibid. p. 32,) so that the position now is different in a very important respect. Furthermore, the question of the petitioner's standing is untouched by the English cases.

We repeat that if in any case such a proceeding as the present is possible, the utmost diligence and good faith are the conditions, without which it cannot be entertained. If there were degrees in the requirement, it would be peculiarly exigent in a case presenting so many suspicious elements as this. But the petitioner, relying on getting the advantages of a widow without any of the troubles which she found incident to being a wife, and thinking that she would be better able to prove her case if the opposition of her husband was removed, waited until his death before she took a step. Whether it be called laches or be given a harsher name, such a course put an end to any claim she ever may have had to be heard. *Hubbard* v. *Hubbard*, 19 Col. 13. *Singer* v. *Singer*, 41 Barb. 139. *Nichols* v. *Nichols*, 10 C. E. Green, 60, 65. *Nicholson* v. *Nicholson*, 113 Ind. 131, 136. *Shaw* v. *Gould*, L. R. 3 H. L. 55, 87, 88. *Campau* v. *Van Dyke*, 15 Mich. 371. *Holbrook* v. *Holbrook*, 114 Mass. 568. *Evans* v. *Bacon*, 99 Mass. 213.

*Demurrer sustained.*

Digitized by Google

ELIZABETH BUCKNAM *vs.* GEORGE C. BUCKNAM.

Middlesex. March 26, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Separate Support — Relations of Husband and Wife — Constitutional Law.*

The court has power to make an order, under Pub. Sts. c. 147, § 33, for the separate support of a wife while living in the same house with her husband and performing some of the duties of a wife; and the statute is constitutional.

PETITION to the Probate Court, under Pub. Sts. c. 147, § 33, for separate support. The case was submitted on appeal to the Superior Court, and, after an order to the respondent to pay certain sums at certain times to the petitioner, to this court, on appeal, upon an agreed statement of facts, the nature of which appears in the opinion.

*S. K. Hamilton & T. Eaton*, for the respondent.

*F. S. Hesseltine*, for the petitioner.

KNOWLTON, J. This is a petition filed in the Probate Court under Pub. Sts. c. 147, § 33, alleging that the respondent fails, without just cause, to furnish suitable support for the petitioner, who is his wife, and asking that the court make an order for her support. The only question before us is whether the court has power to make such an order while the wife is living in the same house with her husband and is performing some of the duties of a wife. The statute enumerates three classes of cases in which the court may make an order concerning the support of a wife. It may be done "when a husband fails, without just cause, to furnish suitable support for his wife, or has deserted her, or when the wife for justifiable cause is actually living apart from her husband." There would be no reason for the first class of cases if the power of the court to make an order was intended to be limited to cases in which the husband and wife are living apart from each other. In most, if not all, of the cases which have arisen hitherto, the husband and wife were living apart. Doubtless there will seldom be occasion for an order of the court in behalf of a wife who continues in enjoyment of marital relations with her husband. But to hold that a

Digitized by Google

wife can have no relief so long as she continues to live with her husband, however grossly he neglects to furnish her with needed support, would be to nullify the first clause of the section referred to.

The agreed facts under which the order was made show that the parties do not occupy the same room or bed, that they do not eat together, nor have any conversation except such as is absolutely necessary, although she cooks the food furnished by him for both. They also show that she is in great need of clothing, medicine, and other things which he refuses to furnish. The language of the statute indicates an intention that the courts shall have jurisdiction to order relief in such cases.

In the last sentence of the opinion in *Bigelow* v. *Bigelow*, 120 Mass. 320, which holds that this statute is constitutional notwithstanding that it authorizes an order for the support of a wife and children without securing to the husband a right of trial by jury, there is a plain intimation that this is the meaning of the statute. There is also an expression of a doubt whether it "could be upheld as a regulation by the Legislature of the duty of a husband to support his wife and children while living with him."

The constitutionality of the law is affirmed in that case on the ground that an order for support of a wife and children while she is living apart from her husband is within the exception, stated in the fifteenth article of the Declaration of Rights, to the provision securing a right of trial by jury, which exception includes all "cases in which it has heretofore been otherways used and practised." Under the provisions of law prior to the adoption of the Constitution, all cases of marriage, divorce, and alimony were heard by the Governor and Council, and of course without a trial by jury. Anc. Chart. 243. Although at that time there was no statute like that now before us, this statute is only a new method of enforcing a right growing out of marriage, which was enforced by an order for alimony after a divorce from the bonds of matrimony, or a divorce from bed and board, or after the commencement of proceedings to obtain a divorce. The term "alimony" in its broad sense means support to which the wife or children are entitled on account of the misconduct and neglect of the husband and

Digitized by Google

father. We think that this statute, in its application to a wife in need of support from a husband who fails to perform his marital duties in the family while she is living with him, is merely an enlargement and extension of the remedies existing in cases of marriage, divorce, and alimony, before the adoption of the Constitution. It therefore falls within a class of subjects which, previously to the adoption of the Constitution, were judicially dealt with without a trial by jury. In reference to cases of desertion by the husband which had just occurred, and cases of a wife justifiably living apart from her husband for a slight cause although the husband's wrong would not entitle the wife immediately to a divorce, or to alimony under former laws, this construction was put upon the statute in *Bigelow* v. *Bigelow*, *ubi supra*, and for this reason the statute was held constitutional. We think that the principle of that decision should apply as well to the present case. *Order affirmed.*

---

JULIA A. FITZPATRICK *vs.* HERBERT A. NORDSTROM & others.

Middlesex. March 26, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Bond given under the Bastardy Act — Surrender of Principal to Court.*

If the surety upon a bond given under the bastardy act surrenders the principal to the Superior Court, when the complaint is pending there, by the provisions of Pub. Sts. c. 85, § 8, the bond becomes void.

CONTRACT, against the principal and sureties on a bond given under the bastardy act. Trial in the Superior Court, before *Blodgett*, J., who found for the defendants, and at the request of the plaintiff reported the case for the consideration of this court. If the finding was wrong, the case was to be sent to an assessor to determine the amount recoverable by the plaintiff; otherwise judgment was to be entered for the defendants.

Digitized by Google

*J. J. Higgins*, for the plaintiff.

*C. S. Lincoln & G. W. Anderson*, for the defendants.

BARKER, J. It is true that a bond given under the provisions of Pub. Sts. c. 85, § 6, in the court to which the original complaint is addressed, may be security for the performance by the defendant of any order entered by the Superior Court under the provisions of Pub. Sts. c. 85, § 15. *Dineen* v. *Williams*, 138 Mass. 367. Pub. Sts. c. 85, § 7. See also *Hodge* v. *Hodgdon*, 8 Cush. 294; *McGrath* v. *Conway*, 116 Mass. 360; *Hanlan's case*, 119 Mass. 59; *Tracy* v. *Howe*, 119 Mass. 228; *Barnes* v. *Chase*, 128 Mass. 211.

It is also true that a default of the defendant, by failing to appear in the Superior Court at any time when his presence is required therein to answer to the complaint then pending, is a breach of the condition of such a bond. *Jordan* v. *Lovejoy*, 20 Pick. 86. *McGrath* v. *Conway*, 116 Mass. 360, 361. *Tracy* v. *Howe*, 119 Mass. 228, 229. Therefore, the default of the defendant Nordstrom in the Superior Court on April 27, 1898, was a breach of the bond in suit.

But by the provisions of Pub. Sts. c. 85, § 8, the surety upon such a bond, if the complaint is pending in the Superior Court, may surrender the principal to that court, "and in case of such surrender the bond shall be void." It is stated in the report that Nordstrom was so surrendered. Thereupon, by the terms of the statute, the bond became void, and so no suit can be maintained upon it. It is, therefore, unnecessary to inquire whether the bond, if not so made void, would have been discharged by the final order of affiliation upon which, at the instance of the complainant, Nordstrom was imprisoned until discharged under the provisions of Pub. Sts. c. 85, § 20. See *M'Hugh, petitioner*, 3 Cush. 452, 454; *Towns* v. *Hale*, 2 Gray, 199, 203; *Power* v. *Fenno*, 10 Gray, 249, 250; *Young* v. *Makepeace*, 108 Mass. 233, 235.

*Judgment for the defendants on the finding.*

Digitized by Google

## MALCOLM McLEAN *vs.* WILLIAM O. WILEY & others.

Suffolk. March 26, 27, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Mechanic's Lien — Additional Labor to save Lien — Accommodation Note.*

Work done by a mechanic under a contract substantially performed at an earlier date, although it is of small amount, will save his lien if it is done in good faith, for the purpose of completing the contract, and not merely for the purpose of saving the lien.

At the trial of a petition to enforce a mechanic's lien the petitioner testified that at the request of the respondent he took from him certain notes for his accommodation and not in satisfaction of the debt, raised money upon them, and arranged, at the request of the respondent, to know where each note was, so that the respondent could pay it before it fell due. The notes were not credited in the account until they were paid, and some of them were outstanding in the hands of third persons when the statement of lien was filed, but all had been taken up by the petitioner before he filed his petition, and at the trial were turned into court by him for cancellation. *Held*, that the judge properly refused to rule that the petitioner could not maintain a lien for such portion of his account as was included in the outstanding notes.

PETITION, to enforce a mechanic's lien. Trial in the Superior Court, before *Aiken*, J., who found the lien to be established; and the respondents alleged exceptions. The material facts appear in the opinion and in a note by the reporter.

*I. R. Clark & G. A. Blaney*, for the respondents.

*T. W. Proctor*, (*A. B. Coffin* with him,) for the petitioner.

HOLMES, C. J. This is a petition to enforce a mechanic's lien. The statement was filed on March 11, 1898, and the petition on May 9, 1898. Continuous work under the contract stopped on December 21, 1897, and the respondents contend that the statement was filed too late. The petition, however, had items for labor on January 11 and 24, and on February 14, which last, of course, would make the statement in time, although the item was small, if the work was done in good faith under the same contract with the rest, for the purpose of completing that contract, and not under a different one, or merely for the purpose of enabling the petitioner to file a statement. *Monaghan* v. *Putney*, 161 Mass. 338. *Miller* v. *Wilkinson*, 167

Digitized by Google

Mass. 136. The question when the petitioner stopped work under his contract was left to the jury with proper instructions, and they answered that he stopped on February 14, so that the main question on this part of the exceptions is whether there was any evidence to warrant the finding.

The petitioner testified in terms that "the work continued right through until February 14," and also as follows: "I claimed I did the last work February 14; at that time I never thought of a lien at all; . . . the work in January and February was a continuous work on my contract; the work which was done on the 14th of February amounted to $1.86 to finish up the job." In view of this it is impossible to say that there was no evidence to warrant the finding, although there was other testimony that tended to enhance the suspicion naturally roused where a lien is saved by a small job being done months after the body of the work was finished, and a job which the petitioner himself characterizes as repairing or redoing work which had been done before. In this case, however, the good faith of the petitioner is not questioned. The instructions asked upon this point, so far as they implied a general ruling for the respondents, properly were refused. So far as they meant that if the contract had been performed before February 14 the petitioner could not recover, they were given in substance. The judge was not bound to adopt the words or the dramatic form in which the work of February 14 was presented by the respondents as a trifling after repair.*

* The petitioner's foreman testified that on February 14, after erecting a staging over the respondents' platform scales for the purpose of fixing some sheathing, the petitioner's men stopped further work there because it interfered with the respondents' use of the scales, and that they then eased a door and some windows which had become swollen. The respondent Wiley also testified that he accepted the work from the petitioner on December 18, and the carpenters and laborers quit work on that day. The respondent asked the judge to rule, 1. That if the only work done on February 14, 1898, was the mere easing of a door which had sagged, and a window which had swollen from dampness after they had been built by McLean and accepted by Wiley, the petitioner cannot recover for any labor and material furnished prior to that date. 2. That on the evidence the petitioner cannot recover more than $1.86, the charges for work done on February 14, 1898. The judge instructed the jury that if, after December 22, the petitioner in good faith, in the honest execution of his contract, performed any labor which

Digitized by Google

The petitioner received from the respondent Wiley certain notes. According to his testimony he took them at the respondent's request, upon an express understanding that they were not taken in satisfaction of the debt, but to accommodate the respondent. The petitioner raised money upon them, arranging, at the respondent's request, to know where each note was, so that the latter could pay them before they fell due. The notes were not credited in the account until they were paid. Some of these notes were outstanding in the hands of third persons when the petitioner filed his statement, although before he filed his petition he had taken them all up, and at the trial turned them into court for cancellation. The respondent asked a ruling that the petitioner could not maintain a lien for such portions of the account as were included in these outstanding notes. See *Green* v. *Fox*, 7 Allen, 85. This was refused and he excepted. It sufficiently appears from what we have said that the jury were warranted in finding that the notes neither satisfied nor suspended the petitioner's lien, but were a collateral arrangement for the respondent's accommodation which left the petitioner's rights intact. *Casey* v. *Weaver*, 141 Mass. 280. *Quimby* v. *Durgin*, 148 Mass. 104. *Davis* v. *Parsons*, 157 Mass. 584. *Exceptions overruled.*

---

the proper and substantial performance of the contract called for, the date of such performance is the time when he ceased to labor on the contract; but if the contract had been substantially performed on December 22, and the petitioner thereafter did some trifling amount of labor not necessary to its complete performance merely for the purpose of fixing some date relative to the filing of a statement, that date would not be the time when he ceased to labor or furnish materials within the meaning of the statute.

Digitized by Google

## ELIZABETH G. PARKE *vs.* JAMES G. MABEE.

Suffolk. March 27, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Municipal Court — Appeal — Indorsement on Bond.*

The indorsement on a bond given on taking an appeal from a municipal court, "Bond and Surety approved. Bond filed. N. T. M., Jr., Clerk," in the absence of anything further, sufficiently shows that the bond was approved by the court as required by St. 1888, c. 325, § 1.

HOLMES, C. J. This was a summary process for the recovery of land, originally brought in the Dorchester Municipal Court. The plaintiff had a judgment there, and the defendant appealed to the Superior Court. The plaintiff moved to dismiss the appeal as irregular. This motion was overruled by the Superior Court, and now, after a trial and verdict for the defendant, is brought here by appeal.

The record shows that the bond given on taking the appeal was indorsed "Bond and Surety approved. Bond filed. N. Thomas Merritt, Jr., Clerk." The plaintiff's argument is that this discloses on its face that the approval was by the clerk, according to what is said to have been the old practice under the Public Statutes before the amendment of 1888; Pub. Sts. c. 175, § 6; St. 1888, c. 325, § 1; or at least that it does not show that the bond was approved by the court. *Putnam* v. *Boyer*, 140 Mass. 235.

In our opinion the words are sufficient to express an approval by the court. The entry on the docket of this court for the same purpose when a writ of error from the Supreme Court of the United States is allowed, is in the same form.

It is true that in the present case the entry is not on the docket, and that although the bond was a necessary part of the appeal it would be contrary to popular understanding to call the bond part of the record or to say that an indorsement upon it was an entry of record. But the bond remains in the custody of the court, and an indorsement upon it is a usual way of show-

Digitized by Google

ing that it is approved. If the approval were indorsed by the judge's own hand, there could be no question. When it is to be approved by the court, it seems to us as proper for the clerk to note the action of the court upon the bond as it is that he also should note it in his docket. The clerk's function is to certify the court's action, and whenever it is proper that it should be certified it is proper for him to certify it.

It is a very common practice in this and probably in other courts, when judicial action has been taken upon a paper, — bond, petition, pleading, or whatever it may be, — for the clerk, at least in the first instance, merely to indorse the result of the action upon the paper with his attestation and without adding the words "By the court." See further *Rawson* v. *Dofner*, 143 Mass. 76; *Howes* v. *Maxwell*, 157 Mass. 333, 335.

*Order overruling motion to dismiss affirmed.*

*G. W. Parke*, for the plaintiff.

*P. B. Kiernan*, for the defendant.

---

WILLIAM H. STAPLES *vs.* CITY OF SOMERVILLE & others.

Middlesex. March 27, 1900. — May 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Assignment of Building Contract by Contractor without Consent of Contractee — Order for Payment of Money — Insolvency — Trustee Process — Mechanic's Lien.*

If a contract for the erection of a schoolhouse for a city is, without the consent of the city, assigned more than six months prior to the commencement of proceedings in insolvency by the assignor, the assignee thereof, who, after notice to the city of the assignment and the record thereof in the office of the city clerk, completes the contract at his own expense, and from time to time receives payments from the city on account of the work, is, upon completion of the building and its acceptance by the city, equitably entitled, as against the assignee in insolvency of the assignor, to the balance due under the contract, although by its terms the contract was not assignable without the written consent of the city; and if, prior to the assignment of the contract, the assignor had been paid by the city all that he had earned under it, an order by him on the city for the payment of a sum of money to a creditor not accepted by the city will not be deducted from

Digitized by Google

such balance, nor will such balance be liable to an attachment by a creditor of the assignor in an action commenced by the trustee process within four months before the commencement of proceedings in insolvency.

A mechanic's lien cannot be maintained upon a building which has been erected by a city to be used as a schoolhouse.

BILL IN EQUITY, filed March 8, 1898, by William H. Staples of Lowell, against the city of Somerville, Edward F. Staples, William A. Sanborn, John Harrington, William J. McCarthy, T. Fred Berry, and E. Rhodes Ferguson, to compel the first named defendant to pay the balance alleged to be due under a contract for the erection of a schoolhouse, to determine how much, if any, of such fund is due to the defendant Harrington, and to restrain the individual defendants from prosecuting certain actions at law.

The bill alleged that the defendant Staples, on October 3, 1896, made a contract to erect a schoolhouse for the city of Somerville for the sum of $23,000, and gave a bond with the American Surety Company as surety for the faithful performance of the contract; that before the execution of such bond by the surety the plaintiff gave to it a bond for $8,000 to indemnify it against loss from its undertaking as surety; that the defendant Staples began the work but was unable to finish it, and on April 10, 1897, assigned the contract and all moneys, benefits, and emoluments to be derived therefrom to his father, the plaintiff, who, at the suggestion of the city solicitor of Somerville and others, assumed charge of the work for his own protection; that at the date of the assignment the defendant Staples had been paid by the city of Somerville under the contract the sum of $8,500, and he had no further claim against the city thereunder; that on April 21, 1897, notice of the assignment was given to the city of Somerville, and the assignment was afterward recorded in the office of the city clerk of Somerville and in the office of the city clerk of Lowell; that the city or its representatives did not consent in writing to the assignment to the plaintiff pursuant to the terms of the contract, but that the plaintiff completed the contract at his own expense without objection from the city, which accepted the building in September, 1897; that the plaintiff expended for labor and materials the sum of $18,540, and received from the

Digitized by Google

city of Somerville the sum of $10,500, being the proceeds of checks payable to the joint order of himself and his son, Edward F. Staples, which were receipted for by their joint receipts; that a balance of $4,000, due under the contract, remained in the possession of the city, which the city was ready to pay to the person entitled thereto; that subsequent to February 17, 1897, an order for the payment of the sum of $1,000.50 was handed to the city treasurer by John Harrington, the payee, which the treasurer refused to accept; that on July 30, 1897, the defendant McCarthy filed in the registry of deeds a statement of a lien for $450, for labor furnished on the building; that on November 29, 1897, the defendant Staples filed a voluntary petition in insolvency, and on December 21, 1897, the defendant Sanborn was appointed assignee of his insolvent estate, and, as such, claimed the balance of $4,000, due under the contract; and that, on August 3, 1897, and on subsequent dates, actions were commenced by the defendants Berry, Ferguson, Sanborn, and McCarthy against the defendant Staples, in which the city of Somerville was summoned as trustee of the goods, effects, and credits of the principal defendants therein, which were pending at the date of the bill.

The prayer of the bill was that the assignment to the plaintiff be declared valid; that a decree be entered requiring the city of Somerville to pay to the plaintiff the balance of $4,000, due under the contract; that it may be determined to what proportion if any of the $4,000 the defendant Harrington is entitled; and that the defendants Sanborn, McCarthy, Berry, and Ferguson be enjoined from prosecuting their actions and be ordered to discontinue them as against the trustee, and be further enjoined from prosecuting any action for the same cause of action in which the city of Somerville shall be summoned as trustee.

The order referred to in the bill, dated February 18, 1897, was signed "E. F. Staples, Contractor," and requested the city of Somerville to "pay to the order of John Harrington one thousand $1000\frac{50}{100}$ dollars being part payment of stone furnished by him for the Ward One schoolhouse and charge the same to second payment on contract from this date for said school."

Digitized by Google

By article 10 of the contract it was provided that the builder "shall not assign this contract . . . without the consent in writing given by the Committee on Public Property of the City Council of said city."

The city of Somerville filed an answer by which it offered to pay the balance af $4,000 to the party equitably entitled thereto, and asked that the parties be required to interplead, and that the court order and decree to whom the payments should be made.

At the trial in the Superior Court, before *Fessenden*, J., there was evidence tending to show that the defendant Edward F. Staples received the first four payments, amounting to $8,500, at the times stipulated in the contract, and that no other payment was earned by him; that in the order given by him to Harrington the phrase the "second payment on the contract from this date" referred to the fifth payment mentioned in the contract; and that the order was not accepted by the city, but was held by the treasurer, to be paid if money should come into his hands belonging to Edward F. Staples with which to pay it.

The defendant Harrington requested the judge to rule that he was entitled to a decree for $1,000.50, being the amount of the order given to him by the defendant Staples, with interest from September, 1897, to be paid by the city of Somerville out of the balance of $4,000 then held by it. The judge declined so to rule; and the defendant Harrington excepted.

The judge entered a decree that the city of Somerville pay to the plaintiff the sum of $4,000; that the defendant Harrington was not entitled to any portion thereof; that the defendants Sanborn, McCarthy, Berry, and Ferguson discontinue their actions as against the city of Somerville as trustee, and be further enjoined from prosecuting any action in which the city of Somerville shall be summoned to answer as trustee of the defendant Staples by reason of its possession of the sum of $4,000 or any portion thereof.

All the defendants except the city of Somerville appealed to this court.

*T. E. Grover & F. Joy*, for the defendant Harrington.

*J. J. Higgins*, for other defendants.

*J. R. Dunbar & F. E. Dunbar*, for the plaintiff.

Digitized by Google

KNOWLTON, J. The principal question in this case is whether the equitable ownership of the money afterwards earned under the contract passed to the defendant by the assignment from his son Edward F. Staples, and by such recognition of the assignment and of his action under it as appears in the facts before us. The contract was to erect a schoolhouse for the city of Somerville. The American Surety Company was a surety for Edward F. Staples upon a bond for the faithful performance of the contract, and the plaintiff gave a bond to the American Surety Company to indemnify it against loss from its undertaking as surety. Edward F. Staples began the work, but was unable to finish it. It was suggested to the plaintiff by the city solicitor of Somerville and others that he should assume charge of the work for his own protection, and thereupon, on April 10, 1897, an assignment was made from his son to him of the contract, and of all moneys, benefits, and emoluments to be derived therefrom. Notice of the assignment was given to the city of Somerville on April 21, and the assignment was afterwards recorded in the office of the city clerk in Somerville, and in the office of the city clerk in Lowell where the plaintiff lived. By the terms of the contract it was not assignable without the written consent of the city. The city might have refused to recognize the assignment, or to have any dealings with the plaintiff under it. *Pike* v. *Waltham*, 168 Mass. 581. Although no consent to the assignment was ever given in writing by the representatives of the city, the plaintiff went on under it without objection from the city, and completed the contract at his own expense, and the building was accepted by the city. He has received payments from the city on account of his work to the amount of $10,500, which were made by checks payable to the order of himself and his son Edward F. Staples, and were receipted for by their joint receipts. The city appeared in this suit and offered to pay the balance of $4,000 in its hands, to such party as is equitably entitled thereto, and asked that the parties be required to interplead, and that the court order and decree to whom the payments should be made.

Under these circumstances it is immaterial that the city did not consent in writing to the assignment. *James* v. *Newton*, 142 Mass. 366. *Richardson* v. *White*, 167 Mass. 58. Under the



Digitized by Google

authority of these cases the plaintiff acquired equitable rights which entitle him to the money now in the possession of the city. The case finds that his son, Edward F. Staples, has been paid all that he earned under the contract previous to the assignment.

None of the other claims against the fund can be allowed in this proceeding. The order of the defendant Harrington was not accepted by the city, but was held by the treasurer to be paid if money should come into his hands belonging to Edward F. Staples with which to pay it. The order was of no effect against the plaintiff's assignment under which he seeks to recover money earned by himself after the assignment.

The assignment was not fraudulent as against the assignee in insolvency. There is no evidence that there was actual fraud, and the assignment was made more than six months prior to the commencement of proceedings in insolvency.

If it appeared, as it does not, that the creditors attaching by trustee process had acquired rights against this fund, their attachments were dissolved by the insolvency proceedings begun in less than four months after the earliest attachment was made.

Since the building was to be used as a schoolhouse, McCarthy's claim for a mechanic's lien cannot be maintained. *Lessard* v. *Revere*, 171 Mass. 294.

*Exceptions overruled; decree affirmed.*

---

EDWIN N. PAINE, petitioner.

Barnstable. March 16, 1900. — May 19, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Will — "Children of my Deceased Brothers and Sisters" — Statute of Distributions.*

A legacy "to the children of my deceased brothers and sisters" of "all the rest of said stock or securities, to be divided among them as provided in the statutes of the Commonwealth in such cases made and provided," means a division according to the statute of distributions.

Digitized by Google

PETITION, by the executor of the will of William A. Atkins, for instructions as to the construction thereof. Hearing before *Lathrop*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

*R. A. Hopkins*, for the petitioner.

*E. P. Carver & E. E. Blodgett*, for certain respondents.

*E. W. Hutchins & A. S. Wheeler*, for certain other respondents.

*J. W. Converse*, for Florine M. Brown, grandniece of the testator, joined in the brief of Hutchins and Wheeler.

LATHROP, J. William A. Atkins died on April 7, 1897. His will, dated November 26, 1892, was duly admitted to probate on June 8, 1897, and the petitioner was appointed executor. The will, after two specific bequests, in the fifth clause directs his executor, after the payment of these bequests, to convert the estate into money, and to invest the money in the stock or securities of the Post Publishing Company, and to hold the same in trust for the objects set forth in the sixth clause of the will. By the sixth clause the executor or his successor in the trust is directed to pay over said stock or securities, so purchased, "to the persons following so soon as he conveniently can, paying to each person a sufficient amount of said stock or securities to give each of said persons stock or securities in said company of the value in money hereinafter set forth, to wit." Then follow the names of five persons, to four of whom $500 apiece is given, and to one, $1,000; and then comes the following clause marked (f.), the meaning of which is in controversy: "To the children of my deceased brothers and sisters all the rest of said stock or securities to be divided among them as provided in the statutes of the Commonwealth in such cases made and provided."

The seventh clause of the will provides that if the testator's nephew, Edwin A. Grozier, or his representatives should not be stockholders in the Post Publishing Company at the time of the testator's death, or at the time when such investment should be contemplated, then the executor should pay over to the several persons named in the sixth clause of the will the money or balances provided in the fifth clause of the will, paying to each person named in said sixth clause the amount set against his name, "and paying to the children of my deceased brothers and sisters any balance of said money in the proportions fixed by clause sixth paragraph (f.) of this will."

Digitized by Google

The testator had nine brothers and sisters, all of whom died before the date of his will. At the date of the will as well as at the time of his death fifteen of the children of his deceased brothers and sisters were living, and nine were dead, leaving issue then living.

Of the thirty-four persons named as respondents, fifteen are children of the testator's brothers and sisters, or their representatives, two having died since the testator; eleven are grandchildren, representing deceased children; and eight are great-grandchildren, representing deceased children of deceased children.

Edwin A. Grozier was a stockholder in the Post Publishing Company at the death of the testator; and the executor invested from time to time the estate in the stock of the Post Publishing Company, and has a balance in cash.

The executor now asks the court for instructions as to the meaning of paragraph (f.) of the sixth clause of the will.

If the bequest in this case had been simply "to the children of my deceased brothers and sisters," it may be assumed that only those living at the death of the testator would take, except that if any one of these had died, after the making of the will and before the testator leaving issue, such issue would, by force of the Pub. Sts. c. 127, § 23, take the share which would have gone to the parent if he or she had survived. See *Howland* v. *Slade*, 155 Mass. 415.

It is contended that the testator by the reference to the statutes of the Commonwealth had this provision in view; but it seems to us that he meant something more than this. For if this is what he had in mind, there was no need of mentioning the statutes at all.

Some effect, doubtless, must be given to the language used. The division must be "as provided in the statutes of the Commonwealth;" and we are of opinion that the testator had reference to the statute of distributions, Pub. Sts. c. 135, § 3, cl. 2, which incorporates into it the provisions of the Pub. Sts. c. 125. Section 1, cl. 5, of the latter chapter is as follows: "If he leaves no issue and no father or mother, then to his brothers and sisters, and to the issue of any deceased brother or sister by right of representation; and if there is no surviving brother or sister of

Digitized by Google

the intestate, then to all the issue of his deceased brothers and sisters. If all such issue are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise, they shall take according to the right of representation."

The will does not state that the shares are to be divided equally among the children of the testator's deceased brothers and sisters. The word "children" may be interpreted as including representatives of a deceased child. *Bowker* v. *Bowker*, 148 Mass. 198, 203. While the seventh clause of the will refers to a contingency which has not occurred, yet it has a bearing upon the meaning of the words relative to the division of the property under the sixth clause of the will. It refers expressly to it, and says that the money shall be divided "in the proportion fixed by the sixth clause." This shows that the testator did not mean equally, but in a proportion fixed by the statutes of the Commonwealth, which must mean the statute of distributions.

We are of opinion, therefore, that the legacy should be divided into twenty-four parts, one part to be given to each of the fifteen children who were living at the death of the testator, or to the executors or administrators of those who have died since the testator, and that the share of each child who died before the making of the will should go to his or her issue by right of representation. *Balch* v. *Stone*, 149 Mass. 39. *Codman* v. *Brooks*, 167 Mass. 499, 503.

In making the distribution of stock in accordance with the sixth clause of the will, if differences should be left, less than the distributive value of one share of stock, such differences may be adjusted by cash payments.

*Decree accordingly.*

Digitized by Google

MICHAEL J. CAMPBELL *vs.* LEWIS F. ABBOTT.

Suffolk. March 14, 1900. — May 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Personal Injuries occasioned by falling down Cellar Stairs — Due Care.*

A person who, entering a building where he never has been before, without knocking or ringing a bell, finds himself in darkness, and instead of waiting where he is and endeavoring to attract the attention of the family, or retreating, chooses to try to find his way, and while so doing falls down the cellar stairs, is not in the exercise of due care.

TORT, for personal injuries sustained by the plaintiff on November 3, 1896, by reason of a fall occasioned by the alleged defective, dangerous, and improper construction of a flight of stairs and the entrance thereto, in a building owned by the defendant. Trial in the Superior Court, before *Hardy*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

*J. O. Burdett & F. M. Forbush*, for the plaintiff.

*C. R. Elder*, for the defendant.

LATHROP, J. We find it unnecessary to consider the numerous questions which arise in this case, as a majority of the court is of opinion that the plaintiff was not in the exercise of due care. He entered a building where he never had been before, without knocking or ringing a bell. He found himself in darkness, and instead of waiting where he was and endeavoring to attract the attention of the family, or retreating, he chose to try to find his way, and while so doing fell down the cellar stairs.

The case differs from *Parker* v. *Barnard*, 135 Mass. 116, where a policeman entered a building in the night time in the discharge of his duty, and was injured by falling down an elevator well, which was left unguarded, in violation of a statute. It differs also from *Gordon* v. *Cummings*, 152 Mass. 513, where a letter carrier, also in the discharge of his duty, in attempting to enter a building in the night time, mistook an unguarded elevator well, which opened upon the street, for the main entrance to the building, and stepped into it and was injured.

*Exceptions overruled.*

Digitized by Google

## GORDON DEXTER *vs.* CITY OF BOSTON.

Suffolk. March 9, 1900. — May 22, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Statute — Constitutional Law — Contract to recover a Portion of Sewer Assessment — Action — Remedy.*

In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the Constitution in its application to cases which may be expected to arise.

An assessment under St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston," being required to be made according to the lineal measurement of the land along the sewer, that parcel, which receives but slight additional benefit from a turn in the sewer, is doubly assessed; and the statute in this respect is unconstitutional.

The decision in *Weed* v. *Boston*, 172 Mass. 28, as to the unconstitutionality in certain respects of St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston," is reaffirmed.

An assessment under St. 1892, c. 402, relating to sewers in the city of Boston, being void, and the payment by the plaintiff having been induced by compulsory process and made under protest, it may be recovered back in an action of contract; and the fact that the collection was made under St. 1891, c. 323, §§ 16, 18, by adding part of the assessment to the general tax of the plaintiff, does not affect his right.

CONTRACT, to recover a portion of an assessment levied for the construction of a sewer in the city of Boston. At the trial in the Superior Court without a jury, before *Fessenden*, J., the case was submitted on an agreed statement of facts, in substance as follows.

The plaintiff, on December 30, 1893, January 31, 1894, and May 29, 1895, and at the time of the bringing of his writ, was the owner of a large tract of vacant land situated on Commonwealth Avenue, a public highway, and on Malvern, Gardner, and Ashford Streets, private ways in that part of Boston called Brighton. Gardner Street was laid out in 1892 by the plaintiff as a private street, and its location, width, and grades were approved by the board of street commissioners on September 7, 1892, under the provisions of St. 1891, c. 323, but the street has been rough-graded only. At the time of the taking for the construction of the sewer, said tract of land was adapted for

Digitized by Google

moderate priced dwelling-houses, and when filled to grade of surrounding streets will be well adapted for an expensive class of dwelling-houses, and it was worth at the time the sewers were ordered constructed from twenty-five cents to one dollar per square foot, depending upon location and grade. By an order of the board of aldermen, duly approved by the mayor on December 30, 1893, it was adjudged necessary for the public convenience that a common sewer should be laid in Commonwealth Avenue, beginning at a point about five hundred and fifteen feet east of Malvern Street, and a point about one hundred and sixty feet west of Harvard Avenue. Work was commenced on the sewer on January 8, 1894, and it was completed on May 4, 1894; and on May 25, 1895, the superintendent of streets determined the assessments on the land of the petitioner abutting on the line of the sewer to be $1,169.72, said assessment being at the rate of $2.245 per front foot. On January 31, 1894, by an order of the board of aldermen, duly approved by the mayor, it was adjudged necessary for the public convenience that a sewer should be laid between Commonwealth Avenue and Salt Creek outlet, so called, through said land of the plaintiff, through a portion of Ashford Street, the fee of which was owned by the plaintiff and by one Grace, and also through land of Grace; and it was ordered that land of the plaintiff and Grace be taken for the purpose. The city, in compliance with the order, took from the plaintiff a strip of land ten feet in width running from Commonwealth Avenue to Ashford Street for a distance of six hundred and forty-nine feet, including the width of the proposed Gardner Street, which was laid out fifty feet wide. On January 6, 1896, the land of the plaintiff was plotted by the board of street commissioners under the provisions of St. 1891, c. 323, and a proposed street was laid out over the land taken by the city for the construction of the sewer, the sewer being in the centre of the proposed street.

The city also took from the plaintiff and Grace a strip of land ten feet wide running through the private way called Ashford Street for a distance of about two hundred and eighty-seven feet, and constructed therein the sewer, which was completed on May 4, 1895. On May 29, 1895, the superintendent of streets determined the assessment for the cost of the construction of the

Digitized by Google

sewer on the land of the plaintiff as follows: For his frontage of three hundred and four feet on the east side of the taking between Commonwealth Avenue and the proposed Gardner Street, $723.68; for his frontage of three hundred and four feet on the west side of the taking between Commonwealth Avenue and said Gardner Street, $723.68; for his frontage of two hundred and ninety-four feet on the east side of the taking between the proposed Gardner Street and Ashford Street, $699.88; for his frontage of two hundred and ninety-four feet on the west side of the taking between Gardner and Ashford Streets, $699.88; and for his frontage of two hundred and fifty-five and twenty-five one-hundredths feet on the south side of Ashford Street, $607.63. The total assessment of the plaintiff's land on account of said sewer was $3,454.75, and the plaintiff's total frontage assessed was one thousand four hundred and fifty-one and twenty-five one-hundredths feet. The last tract referred to was assessed both for the frontage on the ten foot strip and for the frontage on Ashford Street. The cost of the sewer was $12,811.85, it being one thousand three hundred and thirteen and eighty one-hundredths feet in length. The cost assessed on the various owners was $5,255.20, and the rate per front foot was $2.38. Due notice of these several assessments was furnished the plaintiff, and a separate bill for the assessment on each tract of the plaintiff's land was rendered to the plaintiff. None of the assessments so levied having been paid, the board of assessors, acting under the provisions of law, included in the plaintiff's tax bill issued for the taxes on the land of the plaintiff for the year 1897 a sum equal to nine per cent of the assessments of said lots for said sewers, together with one year's interest on the whole amount of said assessments at five per cent per annum, amounting in the whole to $663.93. The plaintiff, upon demand by the collector, paid said sum to the collector. The board of assessors included in the plaintiff's tax bill issued for taxes on the land of the plaintiff for the year 1898 a further sum of $663.93, being nine per cent of the amount of the assessments, together with one year's interest on the whole amount of the assessments at five per cent per annum. On or about October 1, 1898, the city collector demanded payment of the tax bill, including the sum of $663.93, last mentioned, and on October 31, 1898, the plaintiff paid said sum to the collector under

Digitized by Google

protest in writing. Of the sum of $663.93, the sum of $197.54 was on account of the assessment for the sewer first mentioned, ordered constructed December 30, 1893, and the sum of $466.39 was on account of the assessment for the second sewer, ordered constructed January 31, 1894. The plaintiff seeks to recover only the said sum of $466.39, paid on account of the assessment for the construction of the second sewer. This was a large brick sewer measuring thirty inches by forty-five inches, and was part of a large main sewer designed principally for draining a considerable territory situated at some distance from the plaintiff's land. That portion of the plaintiff's land on the west side of the taking could be drained into the sewer. Of the plaintiff's land on the east side of the taking, a large part was below the level of the sewer, particularly near Commonwealth Avenue, where the surface of the plaintiff's land was at least twelve feet below the surface of Commonwealth Avenue and several feet below the bottom of the sewer. The sewer could be used for draining the plaintiff's land on the east side of the taking only after the land had been filled in. Taking into consideration all possible drainage into the sewer from the plaintiff's land, the sewer was very much larger and more costly than was necessary for the drainage of the plaintiff's land alone. The plaintiff's land had not been developed by the laying out of streets, and was not divided into building lots. Much of it could be made available for building purposes only by filling it in. When divided into building lots, these lots would necessarily differ greatly in size and shape, and would also differ greatly in value, as that portion of the plaintiff's land near the proposed Gardner Street was worth very much less than the portions nearer Ashford Street and Commonwealth Avenue.

The judge found for the defendant, and reported the case for the consideration of this court. If the plaintiff was entitled to recover, judgment was to be entered for him for $466.39, with interest from November 2, 1898; otherwise, judgment was to be entered for the defendant.

*J. Lowell & H. H. Darling*, for the plaintiff.

*S. M. Child*, for the defendant.

KNOWLTON, J. In its essential features this case is like *Weed* v. *Boston*, 172 Mass. 28, in which it was held that St. 1892,

Digitized by Google

c. 402, is unconstitutional in its requirement that all expenses incurred in the making of a sewer in a highway or strip of land or other place in the city of Boston, to an amount not exceeding four dollars for each lineal foot of sewer, shall be repaid to the city as the assessable cost of the work, by the owners of the several parcels of land bordering on the highway or strip of land in which the sewer is made, and in its direction that this assessable cost shall be apportioned to each parcel in proportion to the number of lineal feet which it measures on said highway or strip of land.

It is now settled law in this court, as it is in the Supreme Court of the United States, and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits. So far as there is anything in the early cases which seems at variance with this doctrine, it is controlled by the later decisions. *Boston* v. *Boston & Albany Railroad*, 170 Mass. 95. *Weed* v. *Boston*, 172 Mass. 28. *Sears* v. *Boston*, 173 Mass. 71. *Sears* v. *Street Commissioners*, 173 Mass. 350. *Norwood* v. *Baker*, 172 U. S. 269. The principle involved has been so recently and so fully considered in the cases above cited that it is unnecessary to discuss it at length in this opinion. It was shown in *Weed* v. *Boston* that, as applied to the facts of that case, and of many supposable cases, the requirements of the statute might produce assessments upon some estates greatly in excess of the benefits received, and, as compared with other estates, greatly disproportionate to the benefits. For this reason the statute was declared unconstitutional. In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the Constitution in its application to cases which may be expected to arise. The case then before the court furnished a demonstration of the injustice and deprivation of constitutional rights which might result from the enforcement of the statute. The present case illustrates in a similar way that the assessments on different lands made under this statute are not always proportional to the benefits. There is a great difference in value on account of the difference in grade between lands at different

Digitized by Google

points along the line of the sewer, and there is the same kind of question that was referred to in *Weed* v. *Boston* in regard to an assessment upon land on the southerly side of Ashford Street, so called, where there is intervening land in private ownership between the strip taken in the private way called Ashford Street and the parcel on which the assessment was made. There is also an important fact which was wanting in the other case, namely, that the sewer turns at right angles where it enters Ashford Street, and runs on two sides of the parcel at the corner. As the assessment was required to be made according to the lineal measurement of the land along the sewer, that parcel, which receives but slight additional benefit from the turn in the sewer, is doubly assessed.

That part of the statute which directs the making of assessments in this way is unconstitutional and void. The action of the superintendent of streets in making the assessment rests on this part of the statute, and it is impossible to find anything in it that stands upon a valid part of the statute which is separable from the part that is objectionable. The assessment was, therefore, void, and the payment by the plaintiff, having been induced by compulsory process and made under protest, may be recovered back in this action. *Sumner* v. *First Parish in Dorchester*, 4 Pick. 361. *Lincoln* v. *Worcester*, 8 Cush. 55. *Wright* v. *Boston*, 9 Cush. 233, 241. *Goodrich* v. *Lunenberg*, 9 Gray, 38. *Gerry* v. *Stoneham*, 1 Allen, 319. *Day* v. *Lawrence*, 167 Mass. 371. *Somerville* v. *Waltham*, 170 Mass. 160.

This is not like a case where there is a mere irregularity in the proceedings, which must be taken advantage of by a writ of certiorari. Action under an unconstitutional statute is as if there were no statute. *Fisher* v. *McGirr*, 1 Gray, 1. *Connecticut River Railroad* v. *County Commissioners*, 127 Mass. 50, 57.

The fact that the collection was made under St. 1891, c. 323, §§ 16, 18, by adding part of the assessment to the general tax of the plaintiff, does not affect his right to recover it back in this proceeding. It did not become a part of his general tax, but was separable from it. When a general tax is excessive by reason of overvaluation, or error in including property that is not assessable, the party is left to his remedy by an application for an abatement, and he cannot recover back the tax in an

Digitized by Google

action of this kind. But the provisions of law which prevent recovery in such cases are not applicable to this assessment. According to the terms of the report there must be

*Judgment for the plaintiff.*

---

ALFORD C. WILTON *vs.* RICHARD C. HUMPHREYS & others.

Suffolk. March 27, 1900. — May 22, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Will — Codicil — Previous Declarations of Testator — Exercise of Discretion by Presiding Justice — Contradiction of Testimony of Witness — Statute — Alterations and Interlineations — Presumption of Law — Burden of Proof.*

If an offer is in substance to show by a previous declaration of the testator in regard to the disposition of his property by a will then existing, that he understood the will in a way which would make it improbable that he would refer to it as he did in the codicil as it was finally written, the judge, in the exercise of his discretion, may well hold, in view of other facts, that the evidence is too remote.

If a person is called as a witness, evidence offered of statements made by him tending to contradict his testimony, without previously calling his attention to the statements, is rightly excluded under Pub. Sts. c. 169, § 22; and it is a sufficient answer to the contention that, because the witness was a witness to the will and codicil in question, the statute should not apply to him, that he was not called as a witness to prove the will and codicil, they having been proved and allowed many years before, but to show that the decree of the Probate Court was erroneous.

At the trial of a petition for revocation of probate of a codicil, on the ground that certain words materially altering the legal effect were added after execution, the petitioner is not entitled to a ruling "that the words in the margin being unnoted, and being in different ink, the presumption of law in this case is that they were added after execution," there being no presumption of law in a case of this kind as to the time when the disputed words were written, but the question being one of fact to be determined on all the evidence; and another reason which justifies the refusal to give the ruling is that all presumptions are in favor of the decree, and it cannot be set aside without clear proof, the burden being on the petitioner.

The burden of proof is on a party presenting a will to show that alterations or interlineations in it were made before its execution, and unless there is something in the nature of them, as applied to other parts of the writing, or unless there is other evidence to show that they were a part of the will when it was executed, they will be rejected for want of proof; and anything in the paper itself, as well as in the evidence from outside, which makes it more probable that the changes were made before the execution than that they were made after execution, is sufficient to give the alterations validity.

Digitized by Google

PETITION to the Probate Court for revocation of probate of a codicil, on the ground that certain words materially altering the legal effect were added after execution. Hearing in this court before *Lathrop*, J., who ruled that the burden was upon the appellant, who was the petitioner, to prove by a fair preponderance of the evidence that the words in the margin were added after execution; and having found that the appellant had not sustained such burden, found for the appellees. The appellant alleged exceptions, which appear in the opinion.*

*W. H. Baker & J. Spektorsky*, for the appellant.

*H. P. Harriman & H. E. Perkins*, for John G. S. and Augustus W. Wilton.

KNOWLTON, J. This is a petition to the Probate Court for a revocation of a decree allowing the will and codicil of Alford B. Wilton, and for an allowance of them with certain portions of the codicil stricken out, as having been improperly inserted after the paper was executed. The material portions of the codicil are as follows: "Whereas by my last will and testament dated the eleventh day of April, 1888, in article tenth I gave to my sons and grandchildren the income of rest and residue of my property, after paying my debts and legacies, to be equally divided between them. I do hereby revoke the said legacy, and instead thereof I give and bequeath the income of the said rest and residue of my property as follows: One eighth of the same to my son John George S. Wilton, the other seven eighths to my son Augustus W. Wilton, and my grandchildren, to be divided equally between them. I also give and bequeath to Cornelia E. Lawrence the sum of five hundred dollars." The words "income of" in the first sentence, and the words "income of the" in the second sentence, are written in the margin before the words "rest" and "said," respectively, each of which latter words is at the beginning of a line. These words in the margin and the words "E. Lawrence" in the second clause are in the handwriting of one Knapp, the scrivener who wrote the codicil and who had previously written the will, and are in a different ink from the rest of the codicil and written by a different pen. Knapp testified that the words in question were written before

* For another decision upon this will see *Humphreys* v. *Wilton*, *post*, 451.

Digitized by Google

the execution of the codicil, and as tending to explain the use of a different pen and ink, he testified that he had owned and had used considerably a fountain pen; but no one testified to seeing it at the time of the execution of the codicil, and there was no testimony that there was more than one pen or one bottle of ink in the room at the time. The codicil was written in 1888, and it was evident from the testimony of Knapp, and from his statements at different times, that he had no particular recollection in regard to the making of the first two changes in the codicil, although he testified that when writing the bequest to Cornelia the testator did not remember her married name, and that a little space was left, in which the words "E. Lawrence" were afterwards written when the testator ascertained the name from his son Augustus before the instrument was executed. The codicil correctly describes the bequest in the original will. The appellant offered to prove that, about two weeks before the codicil was made, the testator stated to him how he had left his property by his will, and recited the tenth clause of the will exactly as he thought it was, and that he stated it as it would have been described in the codicil if the words in question had been omitted. The appellant's first exception is to the exclusion of this testimony. The offer was in substance to show, by a previous declaration of the testator in regard to the disposition of his property by a will then existing, that he understood the will in a way which would make it improbable that he would refer to it as he did in the codicil as it was finally written. For some purposes previous declarations of a testator indicating a state of mind or an intention in regard to the disposition of his property are competent when the validity of a will is in question. Subsequent declarations, for the purpose of proving facts bearing upon the validity of a will, are not ordinarily received. *Doe* v. *Palmer*, 16 Q. B. 747. *In re Adamson*, L. R. 3 P. & D. 253. *Smith* v. *Fenner*, 1 Gall. 170. In *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154, it was held, after much consideration, that subsequent declarations of a testator may be received to prove the contents of a lost will. If we assume in favor of the appellant, without deciding, that a testator, making declarations to a relative in regard to the disposition of his property by an existing will, will probably state the truth as he understands it, so that the

Digitized by Google

statement properly may be received as evidence of his belief, the question as affecting the validity of this codicil is not what the testator thought at the time of making the declaration, but what he thought at the time of executing the codicil. If such a declaration is offered, the question immediately arises whether in length of time or in the occurrence of events it is so closely connected with the making of the codicil as fairly to indicate the state of mind of the testator when the codicil is executed, or whether from lapse of time or from the occurrence of intervening events it has ceased to have probative force as to the condition of the testator's mind when he signed the codicil. In the present case we think the judge, in the exercise of his discretion, might well hold, in view of other facts, that the evidence was too remote. It appeared that, because one of his sons came to his room in a condition showing that he had been drinking intoxicating liquors, the testator determined to change the tenth clause of his will. He accordingly sent for Knapp, the scrivener, who had the will in his charge, and requested him to bring it. Knapp came with the will, took it to the testator's room, was told by the testator that he wished to change his will, and there prepared the codicil. The only inference from these facts is that the will was brought by direction of the testator that it might be examined and used in making the codicil. The will was there in the possession of the testator and of the scrivener during the preparation and execution of the codicil. The codicil refers to the clause to be changed in the will by its number, and in this way indicates that the will was then examined. The judge might well find that, if there was any previous forgetfulness or mistake of the testator in regard to the part of the will affected by the codicil, there was no probability that it continued through the interview with Knapp and up to the time of the execution of the codicil, and he well might exclude testimony tending to show that the testator was mistaken about it two weeks before. This exception must be overruled.

The appellant called Knapp as a witness, and then offered evidence of statements made by him tending to contradict his testimony, without previously calling his attention to the statements. This evidence was rightly excluded. Pub. Sts. c. 169, § 22. *Ryerson* v. *Abington*, 102 Mass. 526. *Batchelder* v.

Digitized by Google

*Batchelder*, 139 Mass. 1. The appellant contends that because Knapp was a witness to the will and codicil the statute should not apply to him. In this case he was not called as a witness to prove the will or codicil. The will and codicil were proved and allowed many years ago, and he was called by the appellant to show that the decree of the Probate Court was erroneous. There is no reason why the ordinary rule should not apply to his testimony.

The plaintiff asked the court to rule, "that the words in the margin being unnoted, and being in different ink, the presumption of law in this case is that they were added after execution." There is no presumption of law in a case of this kind as to the time when the disputed words were written. The question is one of fact to be determined on all the evidence. *Ely* v. *Ely*, 6 Gray, 439. The burden of proof is on a party presenting a will to show that alterations or interlineations in it were made before its execution, and unless there is something in the nature of them, as applied to other parts of the writing, or unless there is other evidence to show that they were a part of the will when it was executed, they will be rejected for want of proof. The opportunities for making alterations in a will are often so great, and the requirement of the statute that a will shall not take effect unless it is executed with due formality is so strict, that apparent alterations in a will are looked upon with some suspicion. The validity of changed portions is not assumed, but there may be evidence to establish it; and this evidence may be found in the instrument itself, or may come from outside of it. *Greville* v. *Tylee*, 7 Moore P. C. 320. *Doe* v. *Palmer*, 16 Q. B. 747. *In re Adamson*, L. R. 3 P. & D. 253. *Williams* v. *Ashton*, 1 Johns. & H. 115. *In re Cadge*, L. R. 1 P. & D. 543. *Birch* v. *Birch*, 1 Rob. 675. *In re Swindin*, 2 Rob. 192. *In re Birt*, L. R. 2 P. & D. 214. *In re Penniman's Will*, 20 Minn. 245.

In the case at bar, the codicil with the disputed words in it correctly describes the bequest in the original will, and conforms to the will. If the words were omitted, a comparison of the codicil with the will would show a mistake apparent on the face of the paper. This fact tends to control the ordinary inference against a changed portion of a codicil. Anything in the paper itself, as well as in the evidence from outside, which makes it



Digitized by Google

more probable that the changes were made before the execution than that they were made after execution, is sufficient to give the alterations validity. *In re Birt*, *In re Cadge*, *Birch* v. *Birch*, and *In re Swindin*, *ubi supra*.

There is another consideration which justifies the refusal to give the ruling. The request was to rule that there was a presumption of law in this case. Now this case is not one in which a codicil is presented for probate. It is one in which a decree of a court allowing a will and codicil remained unchallenged for more than ten years before this petition was filed. The petitioner assumes the burden of showing that the decree is erroneous. All presumptions are in favor of the decree, and it cannot be set aside without clear proof. It is plain that "in this case" there is no presumption of law against the validity of the disputed words in the codicil.

*Exceptions overruled.*

---

## PATRICK HOPKINS *vs.* THOMAS O'LEARY.

Suffolk. March 12, 1900. — May 23, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Personal Injuries — Due Care — Assumption of Risk — Duty of Employer to provide Safe Place for Employee — Questions for Jury — Instructions refused but covered by Charge.*

At the trial of an action for personal injuries occasioned to the plaintiff by an explosion of dynamite in a trench in which he was working at shovelling and picking, there was evidence tending to show that a series of holes had been drilled in the rock which the defendant was excavating, and they had been charged with dynamite and exploded by a battery; that the dynamite in one of the holes failed to explode, and that a companion of the plaintiff, who was afterwards set to work there, struck it with his pick and caused an explosion; that the defendant knew, or ought to have known, that when a charge is set off the dynamite in one or more of the holes sometimes fails to explode, and the jury might have found that it was his duty carefully to inspect the holes, or cause them to be inspected, before setting laborers to work there shovelling and picking after a blast. There was evidence to warrant a finding that through the negligence of the defendant, or of some one representing him, no sufficient or proper inspection was made. The plaintiff testified that at half-past nine o'clock on the day of the accident, which occurred at about half-past two o'clock, the defendant told him to go to

Digitized by Google

work in this place and that everything was all right. He had good reason to believe that the place was safe, and he was in the exercise of due care. *Held*, that the evidence warranted a verdict for the plaintiff.

While the employee assumes the obvious risks of the business, he does not assume the risk from the failure of the employer, either personally or through a superintendent, to perform the ordinary duties of an employer in providing against unnecessary or concealed dangers in places in which laborers are set to work; and the jury are rightly permitted to pass upon the question whether the employer was negligent in this particular.

There is no ground of exception to the refusal to give instructions, if, so far as they are founded on correct principles of law, and are applicable to the facts, they are covered by the charge.

TORT, for personal injuries occasioned to the plaintiff on February 4, 1897, by an explosion of dynamite in a trench in which he was working at shovelling and picking. The declaration was at common law. At the trial in the Superior Court, before *Blodgett*, J., the defendant requested the judge to instruct the jury as follows:

"1. There is no evidence which entitles the plaintiff to recover under the first count of his declaration. 2. There is no evidence which entitles the plaintiff to recover under the second count of his declaration. 9. The place furnished by the defendant was not dangerous; he furnished the public street where the excavation was to be made; it was, when furnished by him, safe; if it became dangerous during the progress of the work through the want of care of a fellow servant, the defendant cannot be held liable therefor. 11. If the plaintiff's injury was due to an accident, the defendant cannot be held liable therefor. 15. The defendant owed the plaintiff no duty to warn him of every short-lived or transitory risk. 17. The obligation of the defendant to provide a reasonably safe place where the plaintiff could perform his work did not require the defendant to keep the premises where the work was going on in a safe condition at every moment during the work, as far as its safety depended on the due performance of that work by the employees. 19. If, on the evidence, you find that had an inspection been made by the defendant personally after the blast had been fired, and before the accident occurred, which inspection, if conducted with due care, would not have disclosed the presence of dynamite in the trench, or in any way indicated to the defendant that dynamite was liable to be there, this action cannot be maintained merely

Digitized by Google

because the defendant did not personally make such an inspection. 20. If, on the evidence, it appears that Haggerty was a competent man for the blasting work, that he made an inspection of the spot where the blast was fired after the blast was exploded and before the accident, and that his inspection was made with due care and disclosed no dynamite there, the defendant cannot be held liable merely because the inspection was made by Haggerty and not by the defendant, provided you find that if both the defendant and Haggerty had inspected the place where the blast was set off at said time, they would have both reached the same conclusion that Haggerty reached."

The judge refused to give these instructions, and the defendant duly excepted. The judge instructed the jury, among other things, as follows:

"The employer does not guarantee the safety of those who are in his employ, and from the fact that a workman is injured while doing the work which he is set to do, and while in the exercise of proper care for his own safety, no inference can be drawn by a jury that his employer was at all in fault. On the contrary, the general rule of law in this case, and in all other cases of a similar kind, is that the servant, the employee, takes upon himself the obvious risks of the employment. . . . But while it is true that the servant takes upon himself the obvious risks of the business, there are certain other things which he does not take upon himself, and there are certain duties which the law imposes upon the employer.

"One of the things which the law requires the employer to do is to use reasonable care in the selection of the employees, the servants, who are to work together. . . . In this case, there is no evidence of any failure on the part of the defendant in the performance of his duty in this respect.

"While the employer is not an insurer of the safety of his workmen, he is required to use reasonable care to provide a suitable and safe place in which the work may be done, to provide suitable materials, suitable apparatus, suitable machinery, and so forth. . . .

"The plaintiff says that he had been in the employ of the defendant for a considerable time doing a certain class of work; that he was not employed in blasting, in drilling holes; he was

Digitized by Google

not one of the men under the care or charge of Haggerty or Carroll, [who had charge of the blasting with Haggerty,] but that he was employed as a common laborer, using a pick or shovel, or whatever might be requisite for use, in removing from the trench stone and earth, after a blast had been made. He says that at a certain time, and perhaps so far there is no dispute, he with others came to the place where the work was going on, and were told by the defendant not to go into the trench or excavation until a blast was made. He admits that he knew that dynamite cartridges were used in the blasting at this place. He had seen them. He says that having received this notice from the defendant to keep away from the work until the cartridges were exploded, he and others who were doing work similar to his remained away until the explosion took place. He says that after the explosion he was notified by the defendant to go to work. . . .

"Now, the contention of the plaintiff is that the defendant either knew, or in the exercise of reasonable care would have known, that in the use of dynamite for blasting purposes it sometimes happens that a cartridge does not explode; and that the defendant knew, or should have known, — for negligent ignorance is the equivalent of actual knowledge, — that if a cartridge failed to explode and was left in the rock or ledge, and that then persons went to work with bars, or picks, or shovels, or other implements, there was danger of the exploding of that cartridge and of injury to those who were at work in the immediate vicinity of where the cartridge was. The plaintiff says, therefore, in view of the general rule of law that the employer is to use reasonable care in providing a safe and suitable place in which the employee is to do his work, that with the knowledge which the defendant had, or should have had, and which upon the evidence you may find he should have had, the defendant was chargeable with the exercise of reasonable care to prevent injury to the plaintiff by reason of the failure of a cartridge to explode at the time when an attempt is made to explode all the cartridges. And the contention of the plaintiff is that before men like him were set to work in the trench where the blast had been made, suitable inspection and examination should be made to ascertain whether there were cartridges

Digitized by Google

which had not exploded, and if there were such cartridges, that proper action should be taken to prevent an explosion which might cause injury to those who were working in the trench after the attempt was made to explode all the cartridges. . . . The duty on the part of the employer to use reasonable care for the safety of his workman in this respect is absolute, and must be performed. If the employer delegates it, as he may delegate it, to others, then if those to whom this power is delegated, and who are instructed to make the examination, for instance, in the case I have supposed, fail in the performance of their duty, the employer is responsible. . . .

"I said to you that . . . there is no evidence from which you will be justified in finding that Haggerty or Carroll, or both, were not competent men for the work they were set to do.

"Was it reasonable, after the blast was made, that some inspection and examination, a reasonable inspection and examination, should be made before men were set to work in the trench, to ascertain whether there were in fact any cartridges in the ledge which had not been exploded? That is a question for you. If you say, in view of the general rule of law, and of the knowledge which you find the defendant had, or would have had in the exercise of reasonable care, such inspection, such examination, was necessary, then the question will be whether such examination was made as should have been made. And that you must determine upon all the evidence in the case in respect to that matter. . . .

"There is another ground upon which the plaintiff says he may maintain this action. The plaintiff says that upon the evidence you should find that he had no special knowledge as to the matter of blasting; that he had no special knowledge as to the danger by reason of the failure of some of the cartridges to be exploded when the attempt was made to explode all of them. And the plaintiff says that he relied upon the information given by the defendant, in view of what he assumed to be, and was justified in assuming to be, the superior knowledge of the defendant in respect to that matter. And he says, in substance, that before he went to work in the trench upon the ledge, breaking up the rock, or aiding in removing the rock from the trench, the defendant told him to go to work there,

Digitized by Google

and told him that it was safe and all right for him to go to work there. The plaintiff says that he relied, and had the right to rely, upon that statement of the defendant, and that relying upon it he went to work and was injured, and that upon that ground he is entitled to maintain the action.

"If you find the facts to be as claimed by the plaintiff, the burden being, of course, upon the plaintiff to satisfy you that the plaintiff was in ignorance respecting the matters to which I have called your attention, that the plaintiff did rely upon the superior knowledge which he believed the defendant had, and upon the direction that the defendant gave him, and you find that the plaintiff was justified in relying upon this statement made by the defendant, then the action may be maintained upon that ground, if you find that the plaintiff, at the time of the injury, was in the exercise of due care. . . .

"It was the duty of the defendant to use reasonable care to provide the plaintiff with a safe place in which to work. The defendant must be charged with knowledge of such facts as to the use of dynamite in blasting as he either knew or would have known by the exercise of reasonable care. If he knew or ought to have known that dynamite cartridges sometimes failed to explode when a blast was made, it will be competent for the jury to find that it was the duty of the defendant to use reasonable care to ascertain whether any exploded cartridges were left in the ledge, and to take proper action to prevent injury to employees who were thereafter set to work in the place where such cartridges were, and by whose work such cartridges might be exploded, such employees being, without fault, ignorant of the danger to which they were exposed by reason of the unexploded cartridges."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The rest of the material facts appears in the opinion.

*G. W. Buck*, for the defendant.

*M. J. Creed & J. P. Crosby*, (*W. A. Buie* with them,) for the plaintiff.

KNOWLTON, J. The plaintiff was injured by an explosion of dynamite in a trench in which he was working at shovelling and picking. He had good reason to believe that the place

Digitized by Google

where he was working was safe, and there is no ground for a contention that he was not in the exercise of due care.

A series of holes had been drilled in the rock which the defendant was excavating, and they had been charged with dynamite and exploded by a battery. The evidence tended to show that the dynamite in one of the holes failed to explode, and that a companion of the plaintiff, who was afterwards set to work there, struck it with his pick and caused an explosion. There was evidence tending to show that the defendant knew, or ought to have known, that when a charge is set off the dynamite in one or more of the holes sometimes fails to explode, and the jury might have found that it was his duty carefully to inspect the holes, or cause them to be inspected, before setting laborers to work there shovelling and picking after a blast. There was evidence to warrant a finding that through the negligence of the defendant, or of some one representing him, no sufficient or proper inspection was made. The plaintiff testified that at half-past nine o'clock on the day of the accident, which occurred at about half-past two o'clock, the defendant told him to go to work in this place, and that everything was all right.

The general duty to provide a place for the plaintiff which was reasonably safe, having reference to the kind of business in which the defendant was engaged, was so far personal to himself as a master that he could not escape responsibility by delegating it to another. *Toy* v. *United States Cartridge Co.* 159 Mass. 313. While the plaintiff assumed the obvious risks of the business, he did not assume the risk from the failure of the defendant, either personally or through a superintendent, to perform the ordinary duties of an employer in providing against unnecessary or concealed dangers in places in which laborers were set to work. The jury were rightly permitted to pass upon the question whether the defendant was negligent in this particular. *Rogers* v. *Ludlow Manuf. Co.* 144 Mass. 198, 205. *Neveu* v. *Sears*, 155 Mass. 303. *O'Driscoll* v. *Faxon*, 156 Mass. 527. *Coan* v. *Marlborough*, 164 Mass. 206. *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71. *Dean* v. *Smith*, 169 Mass. 569.

So far as the instructions requested were founded on correct principles of law and were applicable to the facts, they were covered by the charge. The exception to the admission of evidence was not argued. *Exceptions overruled.*

Digitized by Google

ELIZABETH WILLWERTH, guardian, *vs.* JOSEPH WILLWERTH.

Suffolk. March 15, 1900. — May 23, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Findings of Fact by Single Justice on Appeal in Equity — Auditor's Report.*

On an appeal in equity a judge's findings of fact, founded in part upon the oral testimony of witnesses heard before him, will not be set aside unless they are clearly wrong; and an auditor's report being part of the evidence makes, under the statute, a *prima facie* case in favor of the party whose claims it supports.

KNOWLTON, J. This is an appeal from a decree of a single justice of this court affirming a decree of the Probate Court allowing, with certain modifications, the accounts of a guardian of an insane person. An auditor was appointed in the Probate Court, who had protracted hearings and made a report. The case was then heard at length with oral testimony before a judge of the Probate Court, who made a decree in accordance with the findings of the auditor. An appeal was then taken, and another hearing was had before a single justice of this court, who affirmed the decree of the Probate Court. An appeal was then taken to the full court, and we have before us the report of the testimony which was given at the last hearing.

It is a familiar rule that on an appeal in equity a judge's findings of fact, founded in part upon the oral testimony of witnesses heard before him, will not be set aside unless they are clearly wrong. *Chase* v. *Hubbard*, 153 Mass. 91.

Upon the evidence reported it does not appear that there is any error of law or of fact in the decree of the single justice. The auditor's report was a part of the evidence, and under the statute it makes a *prima facie* case in favor of the party whose claims it supports. St. 1889, c. 311, § 1. It would serve no useful purpose to review the evidence.

*Decree affirmed.*

*I. D. Van Duzee*, for the appellant.

No counsel appeared for the appellee.

Digitized by Google

## ANN MULHALL *vs.* JOHN FALLON & others.

Norfolk. March 14, 15, 1900. — May 31, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Death without Conscious Suffering — Employers' Liability Act — Evidence — Dependency — Question for Jury — Right of Alien to Sue.*

A statute cannot impose duties upon a non-resident alien, but it may confer rights upon him. The St. of 1887, c. 270, § 2, confers a right to sue upon the next of kin who is a non-resident alien.

A plaintiff in an action under St. 1887, c. 270, § 2, for causing the death of her son, properly may be asked to what extent, if at all, she was dependent upon him for support.

Partial dependence for the necessaries of life is enough under St. 1887, c. 270, § 2.

TORT, under St. 1887, c. 270, § 2, by the mother and next of kin of Patrick Mulhall, for causing his death without conscious suffering. At the trial in the Superior Court, before *Bell*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

*W. B. Sprout*, (*G. C. Dickson* with him,) for the defendants.

*J. W. McAnarney & J. E. Cotter*, (*J. P. Fagan* with them,) for the plaintiff.

HOLMES, C. J. This is an action under St. 1887, c. 270, § 2, for causing the death of the plaintiff's son. The plaintiff is an Irishwoman who, so far as appears, never has left Ireland. In the Superior Court she had a verdict, and the case is here on exceptions to a refusal to direct a verdict for the defendants, either on the ground that the statute conferred no rights upon the plaintiff, or on the ground that she did not appear to have been dependent upon the wages of her son for support. Exceptions were taken also upon some matters of evidence.

On the question of the plaintiff's dependence upon her son we are of opinion that there was evidence for the jury. It appeared from declarations of the deceased, properly admitted under St. 1898, c. 535, that his mother was very poor, and that he sent over money repeatedly, and regretted not being able to do more. The money, it is true, was received by his father while alive; but the father was a paralytic, and died nearly a year before his son.

Digitized by Google

The plaintiff in her deposition confirmed the statements of her son. She testified that she bought food with his money, among other things, and that she wished she had more to eat.

In answer to the question to what extent, if at all, she was dependent upon her son for support, she answered that she was almost entirely dependent upon him for the last two years. This question was objected to, but was admissible. The extent to which particulars may be summed up in a general expression is a matter involving more or less discretion, and cannot be disposed of by the suggestion that the general expression involves the conclusion which the jury is to draw, or that it is law rather than fact. *Poole* v. *Dean*, 152 Mass. 589, 591. *Windram* v. *French*, 151 Mass. 547, 550, 551. The question to what extent she was dependent upon her son called for details of fact in a perfectly proper way. Whether the answer showed a sufficient dependence to satisfy the statute remained for the jury to answer under the instructions of the court. Even more plainly admissible were interrogatories whether the son contributed to her support, and if so how much. The plaintiff also testified that she "had to turn around and go three miles to earn [her] support," that she had a boy that was hard set to earn from 8*d.* to 1*s.* a day, and another boy an invalid. How far these statements should outweigh the others was for the jury. See *Houlihan* v. *Connecticut River Railroad*, 164 Mass. 555, 557; *Daly* v. *New Jersey Steel & Iron Co.* 155 Mass. 1, 5; *American Legion of Honor* v. *Perry*, 140 Mass. 580, 590. Partial dependence for the necessaries of life would be enough, as it is made in terms by the English statute. 60 & 61 Vict. c. 37, § 7, cl. 2. *McCarthy* v. *New England Order of Protection*, 153 Mass. 314, 318. *Simmons* v. *White Brothers*, [1899] 1 Q. B. 1005. *Atlanta & Charlotte Air-Line Railway* v. *Gravitt*, 93 Ga. 369, 372. In *Hodnett* v. *Boston & Albany Railroad*, 156 Mass. 86, there was nothing to show that the plaintiff did not support herself by her own earnings.

We come then to the more difficult question, whether the plaintiff can claim the benefit of the act. However this may be decided, it is not to be decided upon any theoretic impossibility of Massachusetts law conferring a right outside her boundary lines. In *Mannville Co.* v. *Worcester*, 138 Mass. 89, where a Rhode Island corporation sought to recover for a diversion of waters

Digitized by Google

from its mill in Rhode Island by an act done higher up the stream in Massachusetts, it was held, following earlier decisions, that there was no such impossibility, although the point was strongly urged. It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another State. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered. The same principle is recognized without discussion in *Lumb* v. *Jenkins*, 100 Mass. 527, where a non-resident alien was held entitled to take land by descent. So, after discussion, as to a non-resident's right to sue. *Peabody* v. *Hamilton*, 106 Mass. 217. So the Supreme Court of the United States holds that a right to recover for wrongfully causing death under a State law similar to Lord Campbell's act may be asserted by an administrator appointed in another State. *Dennick* v. *Central Railroad*, 103 U. S. 11. See 8 Am. & Eng. Encyc. of Law, (2d ed.) 879, "Death by wrongful act." It is true that the arguments which prevailed in this case did not prevail in *Richardson* v. *New York Central Railroad*, 98 Mass. 85, and perhaps would not have prevailed in England. *Adam* v. *British & Foreign Steamship Co.* 79 L. T. (N. S.) 31. But so far as the principle for which we cite the case is concerned, it is in accord with our own decisions, assuming that, like Lord Campbell's act, the statute was regarded as conferring a new right of action on the foreign executor or administrator, and not as giving a right of action to the deceased which went to the executor by survival only. *Blake* v. *Midland Railway*, 21 L. J. Q. B. 233, 237. *Seward* v. *Vera Cruz*, 10 App. Cas. 59, 67. The cause of action survived in *Higgins* v. *Central New England & Western Railroad*, 155 Mass. 176. This distinction seems to be lost sight of by many of the cases given in the Encyclopædia as following *Dennick* v. *Central Railroad*, so that their reasoning is not very satisfactory. But see *Bruce* v. *Cincinnati Railroad*, 83 Ky. 174, 182 *et seq.*

The question then becomes one of construction, and of construction upon a point upon which it is probable that the Legislature never thought when they passed the act. In view of the decisions to which we have referred, we lay on one side as too absolute some expressions which are to be found in the English

Digitized by Google

cases, and some of which are cited in *Adam* v. *British & Foreign Steamship Co.* 79 L. T. (N. S.) 31. Our different relation to our neighbors politically and territorially is a sufficient ground for a more liberal rule, at least as to inhabitants of the United States.

One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon non-resident aliens. *Deni* v. *Pennsylvania Railroad*, 181 Penn. St. 525. *Brannigan* v. *Union Gold-Mining Co.* 93 Fed. Rep. 164. But compare *Knight* v. *West Jersey Railroad*, 108 Penn. St. 250. On the other hand, in several States the right of the non-resident to sue is treated as too clear to need extended argument. *Philpott* v. *Missouri Pacific Railroad*, 85 Mo. 164, 167. *Chesapeake, Ohio, & Southwestern Railroad* v. *Higgins*, 85 Tenn. 620, 622. *Augusta Railway* v. *Glover*, 92 Ga. 132, 142, 143. *Luke* v. *Calhoun County*, 52 Ala. 115, 118, 120.

Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain. St. 1887, c. 270, § 1, cl. 3. In the latter case, there would be no exception to the right of recovery if the next of kin were non-resident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical, and when the different provisions are part of one scheme. In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this State. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this State, we cannot believe that so large an exception was silently left to be read in. Whether if the statute were of a different kind we could make a distinction between a mother living just across the

Digitized by Google

boundary line between Massachusetts and Rhode Island and one living in Ireland, need not be considered now.

We are of opinion that the Superior Court was right in letting the case go to the jury. A similar decision has been rendered upon this statute by the United States Circuit Court for this district. *Vetaloro* v. *Perkins*, 101 Fed. Rep. 393.

*Exceptions overruled.*

---

AUBERT J. FAY & others *vs.* JOHN H. HARRINGTON.

Middlesex. March 13, 1900. — June 1, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & BARKER, JJ.

*Libel — Action — Special Damage — Demurrer — Law and Fact — Evidence.*

An article in a newspaper, charging the proprietor of a theatre with discriminating unfairly against the Irish population in his business of giving entertainments to the public, is not actionable in the absence of any allegation or proof of special damage.

Overruling a demurrer to a count in libel does not necessarily mean more than that the judge cannot say as matter of law that the words are not libellous.

Where the real issue in an action for libel is whether the articles in a newspaper complained of are reasonable criticisms of the plaintiff's methods of conducting his business of giving entertainments to the public, the judge rightly refuses to rule that the articles are libellous unless they are true, and properly submits the whole question of the defendant's liability to the jury.

If a newspaper reprints an article from another paper which has reprinted with comments an article in the first named paper, for the publication of which an action for libel is brought, the judge rightly refuses to rule that the defendant is liable for the reprint, which is not counted upon, but is put in evidence, and rightly leaves its effect as evidence of malice to the jury.

The malice required by Pub. Sts. c. 167, § 80, to rebut the defence of truth in an action for libel is actual malevolence in motive.

In an action for libel, in publishing the statement that a theatrical performance was indecent, evidence that the costumes worn by the women who danced on the stage at the performance were similar in style to those usually worn by women dancing on the stage at public performances, is properly excluded.

TORT, in several counts, for libel. At the trial in the Superior Court, before *Fessenden*, J., the jury returned a verdict for the defendant; and the plaintiffs alleged exceptions, which appear in the opinion.

Digitized by Google

*W. H. Bent*, for the plaintiffs.

*J. J. Hogan*, for the defendant.

HOLMES, C. J. This is an action for alleged libels, and has been tried twice in the Superior Court. At the first trial, after a verdict for the defendant, a bill of exceptions was allowed, which is before us. A motion for a new trial also was made, and the verdict was set aside "as to that part of the plaintiffs' claim which relates to injury from plaintiffs being brought into public hatred and contempt," and a new trial was ordered upon the condition that the plaintiffs should claim only on that ground. A second trial was had, which resulted in a second verdict for the defendant, and at this trial a second bill of exceptions was allowed, which also is here. The peculiar order seems to have been made because of a misunderstanding which had prevented the plaintiffs from presenting their case fully; and without further explanation we shall assume, as both counsel assume, that the first exceptions were not waived by what was done after they were allowed.

The plaintiffs are the proprietors of a theatre in Lowell, called the Opera House, and the defendant is the owner and publisher of a newspaper called The Lowell Daily Sun. The alleged libels are articles published in that paper. The first exception that we shall consider is to a ruling at the second trial that the articles were not libellous as charging the plaintiffs with discriminating unfairly against the Irish population, in their business of giving entertainments to the public. This ruling was right in substance and effect, if not in form. There does not appear to have been any allegation or proof of special damages, so that even if the articles had made the charge supposed they would not have been actionable. It cannot be said that such a charge necessarily and in all populations would be hurtful in its effect upon a man's business. It is true that at the first trial, when a similar question was raised, it appeared that "quite a large proportion" of the readers of the defendant's paper were Irish people, and that the Opera House audiences were partly Irish. But even these facts are not enough to show that the statements would hurt the plaintiffs.

Moreover, it is doubtful, at least, whether the articles make the charge alleged. The first one, entitled "Contrast at the

Digitized by Google

Theatres," after saying that there were two excellent Irish plays in Lowell last evening, one at the new Music Hall, the other at the Opera House, and that the Music Hall was crowded while the Opera House "was slimly attended," adds that "Music Hall has popular prices, the best seats in the house selling at 50c., while the management caters for all classes of people without discrimination. The Opera House charges from $1.00 to $1.50 for its best seats, and gives unmistakable evidence that certain people who form the bone and sinew of the town are not catered to." The beginning is to the effect that the public has discriminated against the plaintiffs, not the plaintiffs against any part of the public; and the article then suggests as a reason that the plaintiffs charge high prices and do not cater to the bone and sinew of the town. It is doubtful if the last words properly could be found to refer to the Irish rather than to the laboring class generally, and it is clear that they do not charge any improper discrimination, or anything more than a perfectly legitimate election as to what class of audience shall be sought.

The other article relied on has a heading declaring that the Sun will not be coerced, and is mainly devoted to an account of the Sun's controversy with the Opera House. In the course of it, it mentions the "well known contemptuous expressions" of the plaintiffs "concerning the very people to whom they looked for patronage on the night when their theatre was but partly filled and the new Music Hall crowded to the doors." Assuming that the people referred to were the Irish population, so far from charging a discrimination against them, this article indicates that the plaintiffs looked to them for patronage. It charges contemptuous expressions in conversation, and such a charge, if believed, might tend to keep the Irish away; but it does not charge unfair discrimination in the management of the theatre. So of an alleged statement by one of the plaintiffs that "the Opera House could get along very well without seeking the patronage of the particular class who read the Sun"; and so of the suggestion that the same plaintiff, "in the privacy of his office, came pretty near doing what he could not do publicly without putting out a sign 'No Irish need apply,' this he dared not do," etc. The only other statement which we notice, for none is pointed out on behalf of the plain-

Digitized by Google

tiffs, is that the same plaintiffs' ancestors "were respectable Irish people who would not countenance discrimination against any class," etc. This does not allege that the plaintiffs discriminated. The article as a whole appears rather to negative the notion and to make public private expressions to show that the plaintiffs perhaps would like to discriminate but did not dare.

We ought to add that these two articles were declared on in the tenth and eleventh counts as charging the plaintiffs with unfairly discriminating against the Irish, and that demurrers to the counts had been overruled. We shall deal next with the general effect of overruling a demurrer in an action for a libel. At this point it is enough to observe that if we assume that the judges who tried the case were bound by the decision on the demurrer, and that so long as they did not modify the record and sustain the demurrer to the tenth and eleventh counts, they were technically wrong in refusing to let the plaintiffs go to the jury, still they were right in their view of the substantive law and no harm was done. What we have said disposes of the second bill of exceptions and of a part of the first.

The next exception which we shall take up is to a refusal to rule at the first trial that as a demurrer to the several counts had been overruled, it was established as matter of law that the articles set forth were libellous, and that the defendant was liable unless he proved the truth of the matter alleged. An important part of the justification of the articles was not truth, but that they or parts of them were reasonable criticisms upon a matter of public interest. *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238, 242, 243. But leaving this on one side, the overruling of the demurrer did not have the effect attributed to it. We assume that so long as the order stood unreversed upon the record it was binding to the extent of its consequences upon judges of the same court at later stages of the case. But the plaintiffs exaggerate the consequences. Overruling a demurrer to a count in libel may mean, to be sure, that the words are libellous as matter of law; but it does not necessarily mean more than that the judge cannot say as matter of law that they are not libellous, in which case also he would overrule the demurrer, but would leave the question to the jury. *Twombly* v. *Monroe*, 136 Mass.



Digitized by Google

464, 469, 470. *Shattuck* v. *Allen*, 4 Gray, 540, 546. *Goodrich* v. *Davis*, 11 Met. 473.

The second ruling asked by the plaintiffs at the first trial was that certain articles were libellous as charging the plaintiffs with extortion and cheating, and that unless they were true the defendant was liable. The request rightly was refused. It is doubtful whether the articles properly could be said to make the charge supposed. They hardly alleged any disputed facts. They were criticisms upon the admitted facts. The real issue was whether they were reasonable criticisms. The judge was right enough in leaving to the jury the whole question of the defendant's liability for the articles on other grounds than that of tending to bring the plaintiffs into public hatred and contempt in the conduct of their business. As to the excepted ground there was a misunderstanding, and a new trial granted for that reason. The third ruling asked needs no further remark.

The fifth ruling asked was that certain articles were libellous as charging the plaintiffs with giving indecent and immoral shows in the conduct of their business. This is subject to the same criticism as the others, although, no doubt, on this question there may have been an issue of fact as well as of judgment. It is open to the further observation that the articles referred to a particular exhibition alleged to have been indecent, and hardly could be said to charge a habit, as the ruling asked implied. The question of liability on this ground also properly was left to the jury. Nothing special needs to be added about the sixth request, except that it strains the meaning of the articles.

The defendant reprinted an article from another paper which had reprinted with comments part of one of the articles sued on. There was no count upon this reprint by the defendant, but it was put in by the plaintiffs. The judge rightly refused to rule that the defendant was liable for it, and rightly left its effect as evidence of malice to the jury. We presume that malice was deemed material with reference to the defence of truth. Pub. Sts. c. 167, § 80. To rebut that defence an actual malevolent intent is required by the statute. So with regard to privilege, malice either is a misnomer for exceeding the privilege, or means actual malevolence in motive. This is all that we understand the judge to have said.

Digitized by Google

The only other exception argued relates to the exclusion of evidence that the costumes worn by the women who danced on the stage at a particular performance named were similar in style to those usually worn by young women dancing on the stage at public performances. In many cases evidence of what is usual may be proper in the discretion of the judge. *McMahon* v. *McHale*, 174 Mass. 320, 325, 326. *Janvrin, petitioner*, 174 Mass. 514, 520. But every man of the world knows that the costumes worn upon the stage by dancing women vary so widely, not only in measure but in suggestion, that in this case a reference to what is usual would be wholly uninstructive. A witness who could testify upon that point could testify to what the actual costumes were. The rest was for the jury.

*Exceptions overruled.*

---

## LOUIS E. WHICHER *vs.* BOSTON AND ALBANY RAILROAD COMPANY & another.

Suffolk. November 20, 1899. — June 5, 1900.

Present: MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Carrier — Due Care — Loss of Passenger's Property in Sleeping Car — Breach of Duty — Action — Evidence.*

At the trial of an action against the B. & A. Railroad Company and the W. Palace Car Company for the loss of a travelling bag, it appeared that the plaintiff was a passenger on a sleeping car of the W. Company, which was hauled with other cars from Albany to Boston by the B. & A. Company, leaving Albany at three o'clock in the afternoon and arriving at Boston at nine in the evening; that the W. Company had no control of the car in so far as its movement over the roadbed was concerned, but retained the internal management thereof and hired the porter and conductor for the car; that the porter carried the bag to the section nearest the front door of the car; that the plaintiff remained by it for ten minutes and then went into the smoking compartment of the car at the rear end; that he remained there half an hour, and then returned to his section, took something out of his bag, and returned to the smoking compartment and remained there until the train was approaching Boston; that he then went to his section but the bag was gone, search was made for it but it could not be found; that the train made three stops between Albany and Boston; that the porter testified that he received one passenger at the first stopping-place but none at the other two; that two passengers left the car at the second stopping-place, neither of whom had a hand bag; that no passengers left at the other stations, and that while the

Digitized by Google

train was in motion passengers walked back and forth from the other coaches. He further testified that there were three sleeping cars on the train, and it appeared that there were also ordinary cars. *Held*, that the plaintiff was not in the exercise of due care, and that there was no evidence of a breach of any duty which either of the defendants owed the plaintiff.

CONTRACT, with a count in tort, against the Boston and Albany Railroad Company and the Wagner Palace Car Company, for the loss of a travelling bag. Trial in the Superior Court, before *Sheldon*, J., who, at the close of the evidence, directed the jury to return a verdict for the Boston and Albany Railroad Company, and submitted the case to the jury as to the Wagner Palace Car Company.

The jury returned a verdict for the plaintiff against the last named defendant. The plaintiff alleged exceptions to the order directing a verdict in favor of the Boston and Albany Railroad Company; and the Wagner Palace Car Company alleged exceptions to the refusal of the court to direct a verdict for it. The facts appear in the opinion.

*A. H. Russell*, for the Wagner Palace Car Company.

*E. F. McClennen*, for the plaintiff.

LATHROP, J. There is no material dispute about the facts in this case. The plaintiff was a passenger on a sleeping car of the Wagner Palace Car Company, which was hauled with other cars from Albany to Boston by the Boston and Albany Railroad Company, leaving Albany at three o'clock in the afternoon, and arriving in Boston at nine in the evening. The Wagner Palace Car Company had no control of the car in so far as its movement over the roadbed was concerned, but retained the internal management thereof, and hired the porter and conductor for said car. Although there was some discrepancy in the evidence on the point whether the plaintiff carried his travelling bag to his section, or whether the porter carried it for him, we assume in favor of the plaintiff that the porter carried it for him. The bag was placed in the section nearest the front door of the car. The plaintiff remained by it for ten minutes, and then went into the smoking compartment of the car, which was at the rear end. He remained there half an hour, and then returned to his section, took something out of his bag, and returned to the smoking compartment and remained there until the train was

Digitized by Google

approaching Boston. He then went to his section and his bag was gone. Search was made for it, but it could not be found. The train made three stops between Albany and Boston, namely, at Pittsfield, Springfield, and Worcester. The porter testified that he received one passenger at Pittsfield but none at the other two stations; that two passengers left the car at Springfield, neither of whom had a hand bag; that no passengers left at the other stations; and that, while the train was in motion, passengers walked back and forth from the other coaches. He further testified that there were three sleeping cars on the train, and it appeared that there were also ordinary cars.

The principles of law which govern these cases we consider to be well settled. In the first place neither a railroad company, a steamboat company, a sleeping car company, nor a palace car company owes to a passenger in regard to baggage the duty imposed by law on carriers or innkeepers, where the passenger keeps the baggage in his own custody and control. The only obligation imposed upon them is that of exercising reasonable care, and they are liable only when the loss is due to the negligence or misconduct of the servants or agents of the carrier. Railroads: *Tower* v. *Utica & Schenectady Railroad*, 7 Hill, 47. *Henderson* v. *Louisville & Nashville Railroad*, 123 U. S. 61. *Illinois Central Railroad* v. *Handy*, 63 Miss. 609. Steamboats and steamships: *Clark* v. *Burns*, 118 Mass. 275. *Steamboat Crystal Palace* v. *Vanderpool*, 16 B. Mon. 302. *Abbott* v. *Bradstreet*, 55 Maine, 530. *American Steamship Co.* v. *Bryan*, 83 Penn. St. 446. *Gleason* v. *Goodrich Transportation Co.* 32 Wis. 85. *The R. E. Lee*, 2 Abb. (U. S.) 49. In New York, however, a steamboat is regarded as a floating inn; but we believe this view is peculiar to that State. *Adams* v. *New Jersey Steamboat Co.* 151 N. Y. 163, affirming several earlier cases in that State. Sleeping cars: *Lewis* v. *New York Sleeping Car Co.* 143 Mass. 267, 273. *Pullman Palace Car Co.* v. *Smith*, 73 Ill. 360. *Woodruff Sleeping & Parlor Coach Co.* v. *Diehl*, 84 Ind. 474. *Carpenter* v. *New York, New Haven, & Hartford Railroad*, 124 N. Y. 53. *Welch* v. *Pullman Palace Car Co.* 16 Abb. Pr. (N. S.) 352. *Root* v. *New York Central Sleeping-Car Co.* 28 Mo. App. 199. It is obvious that a higher degree of care is required during the night, when

Digitized by Google

a passenger is asleep, than is required in the daytime, when he can look after his own effects. See cases *supra*. Palace car day coaches: *Whitney* v. *Pullman's Palace Car Co.* 143 Mass. 243.

It is also well established that the mere loss of an article is not evidence of negligence on the part of the defendant. Something more must be shown. *Carpenter* v. *New York, New Haven, & Hartford Railroad*, 124 N. Y. 53. *Sessions* v. *New York, Lake Erie, & Western Railroad*, 78 Hun, 541. *Efron* v. *Wagner Palace Car Co.* 59 Mo. App. 641. *Stearn* v. *Pullman Car Co.* 8 Ont. 171. In *Lewis* v. *New York Sleeping Car Co.* 143 Mass. 267, relied upon by the plaintiff, there were two larcenies the same night, and the porter, who was required to be on duty continuously for thirty-six hours, including two nights, was found asleep in the early morning. These facts were held to be evidence of negligence.

There is no occasion to cite many cases on the point that the plaintiff must show that he was in the exercise of reasonable care. In *Whitney* v. *Pullman's Palace Car Co.* 143 Mass. 243, the plaintiff, a woman, was travelling on a day car of the defendant company. At Portsmouth she and her husband left the car for ten minutes, leaving her satchel upon the sill of one of the car windows, "a conspicuous and exposed place, which could be reached from the outside through an adjoining window, which was open." It was held that her own negligence contributed to the loss, and that she could not recover. See also *Henderson* v. *Louisville & Nashville Railroad*, 123 U. S. 61; *Efron* v. *Wagner Palace Car Co.* 59 Mo. App. 641.

Applying these principles to the facts of this case, we are of opinion that the judge rightly directed the jury to return a verdict for the railroad company. The plaintiff, instead of having his bag checked, chose to retain the control and custody of it. If it had been lost through any fault or negligence of the agents or servants of the railroad company, and the plaintiff had been in the exercise of due care, the case would be different.

In *Kinsley* v. *Lake Shore & Michigan Southern Railroad*, 125 Mass. 54, the defendant's servants and agents, while the passengers were at dinner at a way station, removed the sleeping car, in which the plaintiff and others left their baggage, from the train, and the baggage was put on another car. Part of the

Digitized by Google

plaintiff's baggage was lost in removal. This case differs essentially from the one at bar.

As to the liability of the last named defendant, we are of opinion that the judge erred in submitting the case to the jury. The bag was in no just sense delivered into the sole custody of this defendant. While its servant was carrying the bag into the car, it may have been in the sole custody of the defendant for the moment, but the plaintiff renewed his custody and control over it. Instead of looking out for it, he abandoned it for over five hours. It seems to us that the case falls clearly within that of *Whitney* v. *Pullman's Palace Car Co.* 143 Mass. 243; and is very similar in its facts to *Efron* v. *Wagner Palace Car Co.* 59 Mo. App. 641.

Nor do we see any evidence of a breach of any duty which the last named defendant owed the plaintiff, or what there was for the jury to pass upon. The car was equipped with its usual force of servants. It was running in the daytime as a day car. There was no necessity for the care required in a sleeping car when passengers are asleep. All that was required was the exercise of reasonable care. As has been before stated, the mere loss of the bag was not evidence of a want of such care. There was no evidence of a breach of the defendant's rules by the porter, as in the case of *Dawley* v. *Wagner Palace Car Co.* 169 Mass. 315. The porter in the case before us, for aught that appears, in every way performed his duty, and we see no ground for holding the last named defendant responsible.

The result is that the plaintiff's exceptions must be overruled; and the exceptions of the last named defendant be sustained.

*So ordered.*

Digitized by Google

## JOHN L. GRAVES *vs.* ADAMS EXPRESS COMPANY.

Suffolk. January 8, 1900. — June 5, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Carrier — Stipulation as to Liability — Assent of Shipper — Receipt — "Value asked and not given."*

A common carrier may limit its liability in case of loss by stipulations concerning the value of the property which it undertakes to convey; and the only qualification is that the stipulation shall be brought home to the knowledge of the shipper under such circumstances that his assent to it can fairly be assumed to have been given; and if he accepts and acts upon it without dissent he will be presumed to have agreed to it; and in this case, which was an action against an express company to recover the value of a box containing paintings of great value intrusted to it for carriage and delivery, and lost by it and never delivered, the plaintiff, on the undisputed facts, must be held to have assented to the limitation of the defendant's liability contained in the receipt, and the stamping by the messenger on the receipt of the words "value asked and not given," without the knowledge or consent of the plaintiff, was an immaterial circumstance.

CONTRACT, in the name of the plaintiff, for the benefit of B. Dazzi, to recover the value of a box alleged to have contained two paintings of the value of $3,000, and to have been delivered by the plaintiff to the defendant in Boston for carriage and delivery to Dazzi in New York city, and to have been lost by the defendant and not delivered. The answer admitted the receipt by the defendant from the plaintiff of a box to be forwarded and delivered to Dazzi in New York city, and alleged, among other things, that the box was delivered to the defendant without any statement of its value or contents; that it bore no indication on the outside of the nature of its contents or of their value; that the defendant was and had remained ignorant of such contents and value; and that the box was received by the defendant to be forwarded and delivered only under and upon the terms of an agreement in writing made and accepted in that behalf by the plaintiff, by which it was, among other things, provided that the value of the box was $50, and that the plaintiff should not in any event demand beyond that sum for it. The answer further alleged a tender of $55 by the defendant to the plaintiff before

Digitized by Google

action brought, and the $55 was brought into court under the common rule by the defendant with its answer.

Trial in the Superior Court, before *Fessenden*, J., who ruled that the action could not be maintained to recover more than the amount tendered and paid into court by the defendant, and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions, which appear in the opinion.

*A. H. Russell*, for the plaintiff.

*L. S. Dabney*, for the defendant.

MORTON, J. At the trial it appeared from the plaintiff's testimony that he had been in business for many years, and had been in the habit of sending year in and year out quite a large number of packages by express; that when he delivered goods to the defendant's messengers, they always gave the regular receipt for them; and that blank receipts were kept in his office, and when he got out of them the messenger was notified, and more were left. He further testified that he had shipped goods on valuations and without valuations, and that he was aware that when the value was more than $50 the charge for transportation was increased, and was also aware of the clause valuing the merchandise at $50 unless another value was expressed. He also testified that he gave his clerk instructions as to the shipping of the paintings, but did not say anything to her about the value, or give her any value; that he must have known when the messenger took the box away, although his memory was not clear; and that the receipt was brought to him later in the day by the clerk, and noticing an error in the date he corrected it by writing the true date over it but found no other fault with it, and gave it back to the clerk to put on file. As tending still further to show his familiarity with the valuation clause in the receipt, it appeared from his testimony that he generally filled out the receipts in which a valuation was given, and on the same day on which the paintings were shipped he shipped several other packages, the receipts for which were filled out by him and contained valuations. There was likewise testimony from him tending to show that when a valuation was put into the receipt he prepaid the freight, but that in this instance the freight was to be collected from the consignee. There was no claim that the receipt which the plaintiff got differed as a blank from the other blanks

Digitized by Google

of the defendant company which the plaintiff was accustomed to use.

We think that upon these facts, which are undisputed, the plaintiff must be held to have assented to the limitation of the defendant's liability contained in the receipt. It is settled in this State at least, that a common carrier may limit its liability in case of loss by stipulations concerning the value of the property which it undertakes to convey. *Graves* v. *Lake Shore & Michigan Southern Railroad*, 137 Mass. 33. *Hill* v. *Boston, Hoosac Tunnel, & Western Railroad*, 144 Mass. 284. *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331. *Ballou* v. *Earle*, 17 R. I. 441.

The only qualification is that the stipulation shall be brought home to the knowledge of the shipper under such circumstances that his assent to it can fairly be assumed to have been given. And if he accepts and acts upon it without dissent he will be presumed to have agreed to it. *Cox* v. *Central Vermont Railroad*, 170 Mass. 129.

It appeared at the trial that the words "value asked and not given" had been stamped on the receipt. There was testimony tending to show that this was done by the messenger without the knowledge or consent of the plaintiff. The plaintiff testified that if the value had been asked he would have given it. But assuming that the words were not on the receipt when it was handed to the plaintiff by his clerk, and that they were not stamped on it with his knowledge or consent, and that the value was not asked, it would follow that the plaintiff was content to accept a receipt which contained no valuation, and to let the paintings go without giving a valuation. The stamping of the words upon the receipt did him no harm therefore, and was an entirely immaterial circumstance, even though if he had been asked he would have given the value. The messenger was not required to ask the value, and in the absence of any dissent from the terms of the receipt, we think that the plaintiff was bound by them.

*Exceptions overruled.*

Digitized by Google

ALBERT H. WAITE, trustee, *vs.* WORCESTER BREWING COMPANY & others. CITY OF WORCESTER, intervenor.

Worcester. January 15, 1900. — June 5, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Statute — Claims preferred in Settlements by Receivers — Intervention by City — Taxes — Water Rates.*

This case is governed by St. 1897, c. 400, which provides that "in the settlement of estates by receivers the following claims shall be entitled to priority and to be first paid in full in their order: First. All . . . taxes assessed by . . . any . . . city"; and *it seems* that water rates are covered by the statute.

BILL IN EQUITY, by the trustee of a trust deed made by the Worcester Brewing Company, praying for the appointment of a receiver, and the sale of the property by the court. A receiver was appointed, and all the property, real and personal, was sold by a commissioner under a decree of the court, being subject to mortgages and attachments. This sale was confirmed on April 17, 1899, and the fund directed to be held by the commissioner.

"It is decreed that the priorities of mortgages and of attachments upon the property aforesaid, as of the filing of the bill of complaint herein, shall be maintained, and that in the distribution of the fund resulting from a sale aforesaid, such priorities shall be recognized as binding on the fund in the same manner and way and to the same extent as they were binding on said property."

On June 20, 1899, the city of Worcester intervened, praying that the taxes assessed on the real and personal property of the company be paid as preferred claims out of any assets in the hands of the receiver.

Hearing before *Hardy*, J., who entered a decree "that the taxes upon the real and personal estate of said Worcester Brewing Company for the year eighteen hundred and ninety-eight amounting with interest to the date hereof to twenty-two hundred eighty-one and $\frac{58}{100}$ dollars be forthwith paid as preferred

Digitized by Google

claims to the said City of Worcester, or its tax collector, out of such assets of the Worcester Brewing Company as are in the hands of the receiver. And be it further ordered, that the claim of said City of Worcester for payment of its claim for water rates be disallowed." The Produce Exchange Company and the Cincinnati Cooperage Company, two other intervenors, appealed. The other material facts appear in the opinion.

*W. S. B. Hopkins & F. B. Smith*, (*W. S. B. Hopkins, Jr.* with them,) for the defendants.

*A. P. Rugg & E. I. Morgan*, for the city of Worcester.

MORTON, J. Assuming without deciding that the defendants, the exchange company and the cooperage company, have a *locus standi*, we do not see why the whole matter is not disposed of by St. 1897, c. 400, which took effect in April, 1897, and which expressly provides that "in the settlement of estates by receivers the following claims shall be entitled to priority and to be first paid in full in their order: First. All debts due to the United States, and all debts due to and taxes assessed by this Commonwealth, or by any county, city or town therein."

It is alleged in the petition of the city of Worcester that the property of the brewing company in the hands of the receivers was duly assessed in 1898 for taxes amounting at the date of the filing of the petition for leave to intervene to $2,276.10, and that there was also then due the city for water furnished said company $394.62. In the report of the presiding justice it is said that all facts alleged in the petition were admitted at the hearing to be true, and that it was stated by the receiver "and agreed to by all parties that there were much more than enough funds in his hands to pay the claims set out" in the intervening petition of the city of Worcester. A question was raised at the argument before us, and appears upon the brief of the defendants, whether the funds were in the hands of the receiver or were in the hands of a commissioner appointed by the court to make sale of the property of the brewing company. There was also a question raised by the defendants, likewise appearing on their brief, as to the decree under which the commissioner was authorized to make sale. But afterwards it was agreed in writing between the defendants and the city of Worcester that the case should "be submitted to the Supreme Judicial

Digitized by Google

Court upon the report and briefs heretofore filed." As we understand the position of the case, therefore, the question is whether upon the facts stated in the report of the presiding justice and in the intervening petition of the city of Worcester the decree was right.

We think that under the statute referred to the presiding justice was clearly right in ordering the taxes to be paid as a preferred claim.

The city has not appealed from the decree, and the question whether the water rates should also be allowed as a preferred claim is not therefore before us, though it would seem that they are covered by the statute. *Decree affirmed.*

---

## MARY DOHERTY, executrix, *vs.* A. O. H. WIDOWS' AND ORPHANS' FUND.

Suffolk. January 16, 1900. — June 5, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Beneficiary Association — Substitution of Second Certificate for First — Invalid Designation — Right of Executrix to Sue.*

The substitution of the second certificate for the first issued by a benefit association being effective as between the member and the corporation, an invalid designation in the second has no different effect from what it would have had in the first, and an action may be maintained on the second certificate by the executrix of the member.

CONTRACT, by the executrix of the will of Felix Gallagher, to recover upon a certificate of membership issued upon his life by the defendant. Trial in the Superior Court, before *Hopkins*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

*G. W. Anderson*, for the plaintiff.

*J. W. Corcoran & W. B. Sullivan*, for the defendant.

MORTON, J. There were two certificates issued in this case, the first bearing date November 12, 1895, and the second, June

Digitized by Google

15, 1897. Both were issued to Felix Gallagher, and were in all respects the same except in regard to the dates and the names of the beneficiaries. In the first, Rose Gallagher, a sister of Felix, was named as the beneficiary. She died, and at the request of Felix that certificate was taken back by the defendant and another was issued in which Michael J. Quinn was named as beneficiary, Gallagher paying the fee required by the change. The declaration is upon the second certificate, and the action was originally brought in the name of Quinn. It appeared at the trial, however, that Quinn was not a relative or dependent of Felix Gallagher, and the writ was amended by striking out the name Quinn and inserting that of Mary Doherty, executrix of the will of Felix Gallagher. Each certificate bound the defendant to pay, in sixty days after due proof of the death of Felix Gallagher, to the beneficiary "if living, if not, to the heirs at law of said member in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment not to exceed one thousand dollars." There was evidence tending to show that due proof was made of Felix Gallagher's death, and that a death assessment exceeded $1,000. The court directed a verdict for the defendant, and the case is here on the plaintiff's exceptions.

If Michael J. Quinn had been designated as the beneficiary in the first certificate, and no other certificate had been issued, it is clear that the invalid designation would not have affected the right of the executrix to recover. *Elsey* v. *Odd Fellows' Mutual Relief Association*, 142 Mass. 224. *Rindge* v. *New England Mutual Aid Association*, 146 Mass. 286. *Burns* v. *Ancient Order of United Workmen*, 153 Mass. 173. *Shea* v. *Massachusetts Benefit Association*, 160 Mass. 289. And if the second certificate was effectually substituted for the first, we do not see why an invalid designation in that should have any different effect from what it would have had in the other. The question then is whether there has been an effectual substitution. It was assumed in *United Order of the Golden Cross* v. *Merrick*, 163 Mass. 374, that in case of an effectual substitution an action would lie upon the later certificate. It is not necessary, we think, that in order to entitle a party to recover upon a later certificate it should appear that the substitution was effec-

Digitized by Google

tual for all purposes. It is sufficient if it appears that it was effectual in respect to the right that is asserted. A substitution may be effectual as between the member and the corporation or association that would be ineffectual as between beneficiaries. In the present case the action is brought by the executrix of the member. There is no question between beneficiaries involved. The designation contained in the certificate being invalid, the certificate is to be taken as if it contained no designation whatever; in other words, as an agreement to pay the heirs at law of the member, in sixty days after due proof of his death, a sum equal to the amount received from one death assessment not exceeding $1,000. The certificate did not create a new obligation. It was issued in respect to the same obligation as that in respect to which the first was issued. And as between Felix Gallagher and the defendant we do not see why there was not an effectual substitution of the second certificate for the first.

We think, therefore, that the exceptions should be sustained.

*So ordered.*

---

BEZY HURLBURT *vs.* JOHN B. FITZPATRICK & others.

Suffolk. March 9, 1900. — June 5, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Agreement to convey Real Estate — Forfeit Money — Waiver — Statute of Frauds — Consideration — Money Had and Received.*

A. entered into a written agreement, dated December 7, 1898, with L. to sell and convey, on January 7, 1899, certain land on certain terms. Five hundred dollars was deposited by L. with F. as part of the purchase price, and was to be paid over by him to A. in thirty days. L. being unable to carry out this agreement, on January 11 another in writing was entered into extending the time to February 1, and providing that if L. were unable to carry out the agreement of December 7 he was to pay $2,000, and give a second mortgage of $12,072, and A. was to convey, subject to a mortgage held by P., who, it appeared, held two mortgages both overdue. If L. were unable to perform the modified contract, F. was to pay over to A. after February 1 the deposit. On February 1 the plaintiff's attorney appeared at the time and place agreed on with a deed to L. con-

Digitized by Google

veying the property subject to the two mortgages to P., and L. was informed at or about the same time that the attorney had discharges of these mortgages ready for him. L. was unable to perform his agreement, and, at his request, A.'s attorney gave him more time. On the following day, L. having requested an extension of the two mortgages, an extension was duly executed by P. and delivered to A.'s attorney. Afterwards, at L.'s request, A.'s attorney agreed to wait till March 1, L. saying that if he was not ready he authorized F. to pay over the money. On March 1 A. was ready at the place appointed to deliver the deed, but L. did not appear. *Held*, in an action by A. against F. to recover the deposit, that if the proper construction of the agreement of January 11 was that the property was to be conveyed subject to one mortgage to P., that objection was waived by L.; that the oral modifications of the agreement of January 11 were not within the statute of frauds; and that there was ample consideration for L.'s agreement as to F.'s paying over the money, and after L.'s default F. held it as money had and received to A.'s use.

CONTRACT, to recover $500 "received from Morris Bravman and Mark Lewis to the use of the plaintiff." Trial in the Superior Court, without a jury, before *Hardy*, J., who refused to give certain rulings requested by the defendants Bravman and Lewis, and they alleged exceptions. The facts appear in the opinion and in a note by the reporter.

*E. A. McLaughlin & J. A. Brett*, for the defendants.

*F. R. Rogers*, for the plaintiff.

MORTON, J. The plaintiff entered into a written agreement dated December 7, 1898, with one Mark Lewis, acting for himself, and one Morris Bravman, to sell and convey to said Lewis certain land therein named on certain terms therein set forth. The deed was to be delivered January 7, 1899. The $500 which is the subject of this suit was deposited by said Lewis and Bravman in the hands of the defendant Fitzpatrick as part of the purchase price, and was to be paid over by him to the plaintiff at the expiration of thirty days. Lewis and Bravman were unable to carry out this agreement, and on January 11, 1899, another written agreement was entered into between the plaintiff, acting by her attorney, and Lewis and Bravman, modifying the terms of the first agreement, and extending the time of performance to February 1, 1899. By this agreement, if Lewis and Bravman were unable to carry out the agreement of December 7, they were to pay $2,000, and give a second mortgage of $12,072, and the plaintiff was to convey subject to a mortgage held by one Miss Pope. As a matter of fact it turned out that Miss Pope held two mortgages both overdue. If Lewis

Digitized by Google

and Bravman were unable to perform the contract as thus modified, then Fitzpatrick was to pay over to the plaintiff after February 1 the deposit held by him. February 1 the plaintiff appeared by her attorney at the time and place agreed on, with a deed running to Lewis as he had requested, and conveying the property subject to the two mortgages to Miss Pope; and Lewis and Bravman were informed at or about the same time that he (the attorney) had discharges of these mortgages ready for them. There was no objection to the form of the deed. Lewis and Bravman were unable to perform their agreement at this time, and asked the plaintiff's attorney to wait, and he agreed to do so; and on the following day they requested him to procure an extension of the two Pope mortgages, which he did, and submitted the extension to the attorney of Lewis and Bravman, who approved it, and it was then executed, acknowledged, and delivered to the plaintiff's attorney by Miss Pope. Afterwards Lewis and Bravman asked the attorney of the plaintiff to wait till March; and he agreed to wait till March 1, Lewis and Bravman saying that if they were not ready they authorized Fitzpatrick to pay over the money. On March 1 the plaintiff was ready at the place appointed to deliver the deed, but Lewis and Bravman did not appear.* We deem it enough to say, without taking up the requests *seriatim*, that upon these facts the judge who heard the case was well warranted in finding in favor of the plaintiff. If the proper construction of the agreement of Jan-

* The judge ordered judgment for the plaintiff against the original defendant in the sum of $500, the defendant to have no costs, and also ordered judgment for the plaintiff for costs against the defendants Bravman and Lewis. The two last named requested the following rulings, which the judge refused to give: 1. The plaintiff's contract with the defendants required her to convey the real estate subject to a single mortgage, and therefore the plaintiff was not able to perform the contract, and cannot recover. 2. This contract required her to convey said estate and take back a second mortgage, and there being already two mortgages upon the estate outstanding, the plaintiff was not able to perform her contract, and hence cannot recover. 3. All written contracts between the parties were nullified by mutual agreement and all rights of the plaintiff thereunder waived. 4. After the expiration of the written agreement, the plaintiff and the defendants entered into a new oral agreement for the sale and purchase which was not enforceable against the defendants; and the plaintiff cannot recover.



Digitized by Google

uary 11 was that the property was to be conveyed subject to one mortgage to Miss Pope, the objection that there were two mortgages was waived by the request of Lewis and Bravman to the plaintiff's attorney, that he would procure an extension of the two mortgages held by Miss Pope; and his compliance with that request removed the objection, if any, which they might otherwise have had. The subsequent oral modifications of the agreement of January 11, were not within the statute of frauds. *Cummings* v. *Arnold*, 3 Met. 486. There was ample consideration for the agreement of Lewis and Bravman that if they did not perform their agreement the money in Fitzpatrick's hands should be paid over to the plaintiff by him, and after the default by Lewis and Bravman of March 1, he held it as money had and received to the plaintiff's use. *Exceptions overruled.*

---

## COMMONWEALTH *vs.* MAX DANZIGER.

Suffolk. March 12, 1900. — June 5, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Complaint — Charging an Offence in the Words of the Statute — Constitutional Law — Police Power.*

As a general rule it is sufficient to charge an offence in the words of the statute.

The St. of 1895, c. 497, entitled "An Act to regulate the making of loans upon deposits or pledges of personal property" is constitutional.

COMPLAINT, under St. 1895, c. 497, entitled "An Act to regulate the making of loans upon deposits or pledges of personal property," to the Municipal Court of the city of Boston, alleging that Max Danziger "on the ninth day of October in the year of our Lord one thousand eight hundred and ninety-nine and on divers other days and times between that day and the day of making this complaint, at the City of Boston aforesaid, and within the judicial district of said Court (the said city being then and on said other days and times a city of more than ten thousand inhabitants) did engage in and carry on the business of

Digitized by Google

loaning money upon mortgages, deposits and pledges of wearing apparel, jewelry, ornaments, household goods and other personal property; the said Danziger not being then and on said other days and times there duly licensed as a pawnbroker." The defendant moved to quash the complaint: 1. Because no crime or offence is fully, plainly, substantially, and formally described or set out therein. 2. Because it sets out no offence or crime against the laws of the land or the statutes of this Commonwealth. 3. Because the statute on which said complaint is founded is unconstitutional and void. 4. Because that statute is against public policy and in restraint of trade.

The motion was overruled; the defendant was found guilty, and he appealed.

*R. Levi*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth, submitted the case on a brief.

MORTON, J. 1. The offence is created by statute, and the complaint charges the offence in the words of the statute. As a general rule it is sufficient in such cases to charge the offence in the words of the statute. *Commonwealth* v. *Prescott*, 151 Mass. 60. *Commonwealth* v. *Hodgkins*, 170 Mass. 197. We can see no reason for departing in the present case from the general rule, and think that the complaint is clearly sufficient.

2. The statute was enacted under and by virtue of what is termed the police power, that is, the power to make and establish all manner of wholesome and reasonable laws and statutes for the good and welfare of the Commonwealth. It is not necessary that statutes passed in the exercise of that power should apply equally and uniformly to all citizens of the Commonwealth in order to be constitutional. It is sufficient if they apply equally and uniformly to all who are similarly circumstanced and are not otherwise objectionable. Such statutes have been upheld as constitutional in numerous instances. *Goddard, petitioner*, 16 Pick. 504. *Watertown* v. *Mayo*, 109 Mass. 315, 318, and cases cited. *Commonwealth* v. *Roberts*, 155 Mass. 281. *Commonwealth* v. *Parks*, 155 Mass. 531. *Opinion of the Justices*, 163 Mass. 589. *Cole* v. *Tucker*, 164 Mass. 486. *Newton* v. *Joyce*, 166 Mass. 83. *Commonwealth* v. *Morris*, *ante*, 19. We see nothing in the present case that renders the statute, under which this complaint was

Digitized by Google

instituted, unconstitutional in any other respect. There can be no doubt about the right of the Legislature to regulate the business of pawnbrokers, or of persons engaged in the kind of business described in the statute under which this complaint was brought; neither can there be any doubt as to its right to limit such regulations to persons carrying on such business in cities and towns of ten thousand inhabitants or more. The effect may be to compel persons carrying on the business in cities or towns of ten thousand inhabitants or more to pay a license which persons engaged in the business in cities or towns of less than ten thousand inhabitants are not obliged to pay, but that does not render the statute unconstitutional.

Order overruling motion to quash affirmed.

*Verdict to stand.*

---

COMMONWEALTH *vs.* JOHN McCANCE.

Suffolk. March 13, 1900. — June 5, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Milk not of good Standard Quality — Compliance with Statute — Instructions.*

At the trial of a complaint under St. 1899, c. 223, relative to the standard quality of milk, it appeared that the information furnished to the defendant as to the result of the analysis of the milk was in substance that the milk inspector told the defendant that he would give him the result of the analysis of the samples if he would like it, and did so, telling him the percentages of total solids and of fat in the case of each sample; that afterwards the defendant came back to the inspector's office, and the inspector then told him that he "would give him the figures in writing if he wanted them, and he said he would like the figures of the analysis of the samples that were below standard," and that the inspector wrote them down and caused the paper on which they were to be given to him. *Held*, that there was a sufficient compliance with St. 1899, c. 169, and that, the jury having been so instructed in substance, the defendant had no ground of exception.

COMPLAINT, under St. 1899, c. 223. At the trial in the Superior Court, before *Sheldon*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

Digitized by Google

*R. B. Dewing & S. R. Cutler*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth.

MORTON, J. This is a complaint against the defendant for having "in his possession milk not of good standard quality, that is to say, milk containing less than twelve per centum of milk solids with intent then and there unlawfully to sell the said milk within this Commonwealth." The only question is whether the jury should have been instructed as requested by the defendant that "the information furnished to the defendant as to the result of the analysis of the milk was not in compliance with said Chap. 169 of the Acts of 1899," and whether the instruction that was given was erroneous. The information referred to was in substance that the milk inspector told the defendant that he would give him the result of the analysis of the samples if he would like it, and did so, telling him the percentages of total solids and of fat in the case of each sample; that afterwards the defendant came back to the inspector's office and the inspector then told him that he "would give him the figures in writing if he wanted them, and he said he would like the figures of the analysis of the samples that were below standard," and that the inspector wrote them down and caused the paper on which they were to be given to him.

We think that this was a sufficient compliance with the statute, and that the jury were properly so instructed in substance. The object of the analysis is to show the amount of milk solids or of fat, and if a defendant in any case is furnished with those he is furnished, we think, with the analysis required by the statute to be sent to him.

*Exceptions overruled.*

Digitized by Google

# BROADWAY NATIONAL BANK *vs.* NELSON K. BAKER.
# SAME *vs.* ABBIE S. LEWIS.
# SAME *vs.* DAVID A. SMALL.
# SAME *vs.* GEORGE F. BAKER.

Suffolk. November 22, 23, 1899. — June 9, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, HAMMOND, & LORING, JJ.

*Liability of Stockholder in Foreign Corporation — Judgment — Action — Statute of Limitations — Laches — Equitable Defence — Husband and Wife — Guaranty.*

Stockholders in corporations organized under the laws of Kansas are liable severally, and not jointly, to the judgment creditors of the corporation who pursue the remedy provided by Gen. Sts. of Kansas of 1889, par. 1192. This liability is transitory, and may be enforced in any court of general jurisdiction in a State where personal service can be made upon a stockholder; and the failure of such a creditor to recover judgment against a resident stockholder in this Commonwealth, and to have the execution returned unsatisfied here, is no bar to an action on the judgment recovered in Kansas.

In this case, which was an action against a stockholder in a corporation organized under the laws of Kansas, upon a judgment recovered against the corporation there, the statute of limitations of that State is not a bar.

The doctrine of laches does not apply in an action at law in reference to which there is an express statute of limitations.

A stockholder in a corporation organized under the laws of Kansas, who holds claims against the corporation, may, in accordance with the law in that State, avail himself of the same as an equitable defence to an action against him here upon a judgment recovered against the corporation there; but although by the law of that State he also may be allowed to set off the amount paid by him in good faith for claims purchased after the insolvency of the corporation, if such a claim is one owned originally by his wife, he cannot set it off in the absence of evidence that the arrangement was such a purchase in good faith or such a payment as entitles him to use the claim as an equitable defence to this action.

A loan and trust company, upon the sale by it of a bond of another corporation, has power to guarantee the payment of such bond to the purchaser.

FOUR ACTIONS OF CONTRACT against the defendants, as stockholders of the Commonwealth Loan and Trust Company, a corporation organized under the laws of Kansas, upon a judgment recovered against the corporation in the Circuit Court of the United States for the District of Kansas on December 8, 1893,

Digitized by Google

the actions being based upon the provisions of Gen. Sts. of Kansas of 1889, par. 1192.* The cases were tried together in the Superior Court, before *Braley*, J., who directed the jury to return a verdict for the plaintiff in each case; and, at the request of the defendants, reported the cases for the determination of this court. The facts appear in the opinion.

The cases were argued at the bar in November, 1899, and afterwards were submitted on briefs to all the justices except *Lathrop*, J.

*F. T. Benner*, for the defendants.

*W. R. Bigelow*, for the plaintiff.

KNOWLTON, J. The principal questions in these cases have lately been considered by this court, and by several other courts, State and Federal. The case of *Hancock National Bank* v. *Ellis*, 166 Mass. 414, and 172 Mass. 39, was brought under the same statute as the present cases, and is like them in its facts. *Howarth* v. *Lombard*, 175 Mass. 570, was brought under a statute in the State of Washington, which is different in its provisions, and is differently construed by the Supreme Court of that State; but the principles stated in the opinion in that case are for the most part equally applicable to the causes now before us. In *Whitman* v. *Oxford National Bank*, 176 U. S. 559, the first mentioned statute was carefully considered, many cases were referred to, and a conclusion was reached in entire accord with the other cases above cited.

It is settled by these decisions that stockholders in corporations organized under the laws of Kansas are liable severally, and not jointly, to the judgment creditors of the corporation

* This paragraph is as follows: "If any execution shall have been issued against the property or effects of a corporation except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Digitized by Google

who pursue the remedy provided by paragraph 1192 of the Gen. Sts. of Kansas of 1889. The liability of stockholders under this paragraph, although statutory in its origin, is contractual in its nature. It arises under the contract of subscription to the capital stock, made in becoming a stockholder. This liability is transitory, and may be enforced in any court of general jurisdiction in a State where personal service can be made upon the stockholder. These doctrines are laid down by the Supreme Court of Kansas, and are followed by this court. *Howell* v. *Manglesdorf*, 33 Kans. 194. *Abbey* v. *W. B. Grimes Dry Goods Co.* 44 Kans. 415. *United States National Bank* v. *Magnuson*, 57 Kans. 573. *Ball* v. *Reese*, 58 Kans. 614. In *Hancock National Bank* v. *Farnum*, 176 U. S. 640, it was held, reversing the decision of the same case in 20 R. I. 466, that upon the facts proved the plaintiff had a right to recover under the Constitution of the United States, Art. I., sect. 1, and under the U. S. Rev. Sts. § 905, passed in pursuance thereof. The language of this part of the Constitution is as follows: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." This decision, on constitutional grounds, is controlling upon State courts in favor of creditors who seek to enforce against non-resident stockholders the liability declared by the Supreme Court of Kansas to exist under the constitution and laws of that State. Referring to this liability, this court, in *Howarth* v. *Lombard*, 175 Mass. 570, 575, used language as follows: "In *Hancock National Bank* v. *Ellis*, 166 Mass. 414; *S. C.* 172 Mass. 39, the plaintiff was allowed to recover because a substantive right had grown up which had been held by the court of Kansas to be contractual, and because the preliminary proceedings in Kansas had been taken, which were necessary under the statute to the enforcement of the right in other jurisdictions. These proceedings, which were merely the recovery of a judgment against the corporation with proof that it could not be collected in the ordinary way, removed the only limitation upon the right to proceed by action against any stockholder wherever he might be found." These

Digitized by Google

authorities dispose of the defendants' argument that the failure of the plaintiff to recover judgment in this Commonwealth, and to have the execution returned *nulla bona* here is fatal to these actions, as well as their argument as to the general nature of the liability.

It remains to consider the contention of the defendants that the actions are barred by the statute of limitations or by laches. It is not contended that in any view of the case the statute of limitations of this Commonwealth is a bar to the actions, but the contention is that the statutes of Kansas on this subject relieve the defendants from all liability in these suits. It is agreed that by the terms of the statute of limitations in that State, if a person is out of the State when a cause of action against him accrues, the period limited for the commencement of the action does not begin to run until he comes into the State. It is also agreed that by the decisions of the courts of Kansas this provision applies to non-residents. The auditor has found that the defendants are all residents of Massachusetts, and it does not appear that they ever could have been sued in Kansas.

The statute of limitations in Kansas is of general application. In the statute on which the plaintiff's rights rest, there is no limitation of the right, founded on a requirement that the right be enforced within a specified period of time. Nor is there any ground for the contention that there has been laches which affects the plaintiff's rights. These are actions at law in reference to which there is an express statute of limitations, and the doctrine of laches does not apply. Even if the doctrine did apply, it does not appear that there has been unreasonable delay on the part of the plaintiff in enforcing its rights.

In the case against George F. Baker there is a defence which does not appear in the other cases. This defendant holds claims against the corporation in which his liability as a stockholder is sought to be enforced. These claims he seeks to set off or to use as an equitable defence against the claim of the plaintiff. It is clear that under the statutes relating to set-off in actions at law he cannot avail himself of these claims as an answer to the plaintiff's suit. They are not claims against the plaintiff. But it is held in Kansas that a stockholder who in

Digitized by Google

good faith has voluntarily paid a creditor of a corporation in recognition of his liability under the statute, may avail himself of the payment as an equitable defence to an action of this kind, brought against him by another creditor. It is assumed not only that a stockholder who is also a creditor of the corporation may pay himself in recognition of his liability as a stockholder, but that in good faith he may purchase claims of other creditors after the insolvency of the corporation is known, and that he may be allowed, as an equitable defence, for the amount so paid. *Abbey* v. *Long*, 44 Kans. 688, 692. *Milford Savings Bank* v. *Joslyn*, 59 Kans. 778. *Van Pelt* v. *Strickland*, 60 Kans. 584. It is assumed or implied in the federal courts that such an equitable defence may be allowed. *Brown* v. *Trail*, 89 Fed. Rep. 641, 645. *Whitman* v. *Oxford National Bank*, 176 U. S. 559. The auditor finds that the statutes in Kansas abolish the distinction between law and equity, and establish one form of proceeding called a civil action. He also finds that under these statutes the defendant may set forth in his answer equitable as well as legal defences. If this suit had been brought in Kansas, it seems plain that this defendant could have availed himself of this equitable defence under a statute, to meet a liability which arises under the same statute. In considering the nature of this defence we must follow the decisions of the courts of Kansas. It is a new defence of an equitable character, founded on a new statute creating a new liability. By St. 1883, c. 223, § 14, it is provided that one may plead an equitable defence to an action at law in this Commonwealth. In his answer the defendant says that under the laws of Kansas as interpreted in the case of *Abbey* v. *Long*, 44 Kans. 688, "he has a right and equity to set off against the alleged claim of the plaintiff in this action" the claims which he describes, which he says he held against the Commonwealth Loan and Trust Company when the plaintiff's suit was commenced. This language indicates, although not very clearly, that he intended to avail himself of his right in equity under our statute. No question of pleading was raised at the trial, and if an amendment to the answer is necessary, the defendant, under the terms of the report, should have an opportunity to make it.

It is contended that the Commonwealth Loan and Trust

Digitized by Google

Company could not bind itself by such guaranties as it made to the defendant.* We are of opinion, on the facts found, that its guaranties are binding. See *Van Pelt* v. *Strickland*, 60 Kans. 584. It does not appear that such a contract, made by such a corporation in connection with the sale of a bond, was *ultra vires*. We are of opinion that this defendant has an equitable defence against the plaintiff's claim for the amounts due on the five hundred dollar bond No. 2,251, on the four hundred dollar loan No. 1,613, and on the Fritze loan No. 277, being $1,252.67 in all. The other three claims were originally owned by his wife, and were taken by him to save her from loss after the suspension of the Commonwealth Loan and Trust Company. Under the decision in Kansas, for loans purchased after the insolvency of the company he could only be allowed the amounts paid by him in good faith for the claims which he obtained. Apart from such disabilities in reference to contracting as exist between husband and wife in this Commonwealth, the report does not show that this arrangement was such a purchase in good faith, or such a payment, as entitles this defendant to use the claims of his wife as an equitable defence to this action.

The result is that in the first three cases judgments are to be entered on the verdicts, and in the case against George F. Baker judgment is to be entered for the plaintiff for the amount of the verdict, less $1,252.67, the amount of the enforceable claims which he holds against the corporation.

*Ordered accordingly.*

* The form of the guaranty in each instance was as follows "For value received the Commonwealth Loan and Trust Company hereby guarantees the prompt payment of the interest on the within note as it becomes due, and the collection and payment of the principal sum thereof within two years after the date of default (if any be made), in the payment of the same, and agrees to pay interest upon said note after such default at the rate of seven per cent per annum, computed semi-annually. On condition, however, that this company may at any time purchase the within note of the holder thereof, by paying therefor the face value thereof and the accrued interest thereon at the rate of seven per cent per annum, to be computed semi-annually."

Digitized by Google

## ATLAS NATIONAL BANK *vs.* NATIONAL EXCHANGE BANK.

Suffolk. March 21, 1900. — June 11, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Promissory Note — National Bank — Clearing-house Settlement — Custom — Finding.*

In an action by one national bank against another, both being members of a clearing-house association, to recover the amount of a promissory note included in the account in the clearing-house of the defendant bank against the plaintiff bank, at which it was payable, and returned by the plaintiff to the defendant after the close of business hours, if there is evidence of a universal custom among the members of the association, which choose to clear their notes through the clearing-house in place of presenting them for payment at the banks where they are payable, that if notes included in the clearing-house settlement which turn out not to be good are not returned before the time of closing of the paying bank, the conditional payment becomes absolute, a finding for the plaintiff is not warranted.

CONTRACT, for money had and received. Trial in the Superior Court, without a jury, before *Hopkins*, J., who found for the plaintiff; and reported the case for the determination of this court. The facts appear in the opinion.

*J. P. Sweeney*, for the defendant.

*A. Hemenway*, (*C. B. Barnes, Jr.* with him,) for the plaintiff.

LORING, J. This case comes up upon a report of the Justice of the Superior Court who tried the case without a jury. The report sets forth six rulings requested by the defendant, all of which were denied by the court, and two rulings made by the court. The court found for the plaintiff, and the report concludes as follows: "If, as matter of law on the foregoing facts, the plaintiff is not entitled to recover, judgment is to be entered for the defendant; otherwise judgment is to be entered upon the above finding for the plaintiff."

We think that there may have been a mistake in the terms of the report, stating what questions of law were reserved for the consideration of this court. As the report is drawn, the only question which is open for consideration here is whether, as a matter of law, on the facts stated in the report, the de-

Digitized by Google

fendant is entitled to a verdict. If that were the only question which it was intended should be open in this court, there was no reason for inserting the two rulings made by the court and the last five of the six requests for rulings made by the defendant. The insertion in the report of these rulings and these requests for rulings, and the fact that they have been discussed by counsel at the bar, has led us to think that the concluding paragraph of the report may have been drawn as it was through inadvertence. We are of opinion that the two rulings made by the court were wrong.

The action was brought to recover the amount of a promissory note for $5,000 made by the Boston Woven Hose and Rubber Company, payable to its own order, indorsed by it, by the Lawrence National Bank, and by the defendant bank, and payable at the plaintiff bank on June 16, 1898. It appears from the testimony set forth in the report that the note was included in the account of the defendant bank against the plaintiff bank in the clearing-house on that day, and the amount of it was charged to the Boston Woven Hose and Rubber Company on the books of the plaintiff bank in red ink, as all clearing-house notes are charged, at about eleven o'clock; at the same time the defendant bank was credited with this amount among other items in its clearing-house account. About twelve o'clock the paying teller of the plaintiff bank called up by telephone the treasurer of the Boston Woven Hose and Rubber Company, the maker of the note, and told him that the note was in the bank, to which the treasurer said, "I will attend to that later." At ten minutes before one o'clock the messenger of the plaintiff bank, at the request of the paying teller of that bank, called up the defendant bank upon the telephone and asked for "time" on the note of the Boston Woven Hose Company. He was asked if the note was likely to be paid, answered "Very likely," and received the reply "All right." At a few minutes before two o'clock the paying teller of the plaintiff bank called to the attention of the cashier of that bank the fact that this note had not been paid; the cashier thereupon went to the telephone and tried unsuccessfully to speak with some officer of the Boston Woven Hose and Rubber Company who knew about the bank account; he was told that he would have to speak

Digitized by Google

with one Bryant, the assistant treasurer, and that Bryant would be back shortly. The cashier of the plaintiff bank then went to lunch, getting back at about ten minutes before three o'clock. Upon returning from lunch, the cashier called up Bryant, the assistant treasurer, on the telephone, and asked him what he was going to do with the note in question; Bryant then informed him that the Boston Woven Hose and Rubber Company had made an assignment. The cashier then said to Bryant that it was "rather rough treatment," whereupon Bryant said, "You don't mean to say you have paid it!" And the cashier replied, "Yes, we have paid it;" to which Bryant replied, that in the previous January he had told him "not to pay any notes unless you had received a check to cover the notes." The cashier further testified, in answer to the question whether he remembered that he then stated to Bryant that he did not want to get the Boston Woven Hose and Rubber Company into trouble, and that that was the reason he paid the note, and that he wanted to accommodate them to that extent, "I think I told him that we did it to accommodate them."

After this conversation the cashier directed the bookkeeper to cross out the charge of $5,000 against the Boston Woven Hose Company and the credit in favor of the defendant bank of the same amount, and sent the messenger of the bank with the note to the defendant bank to tender it back and demand the $5,000 credited by reason of it in the clearing-house. This was refused, and the present action was brought.

By the rules of the clearing-house, errors in any item in the clearing-house account, or any claims arising from a payment in that account not being good, were to be adjusted directly between the parties to that account; and in case the item which was not good consisted of a check, it was to be returned not later than one o'clock. There was no rule of the clearing-house as to the time when items other than checks should be returned, which were included in the clearing-house settlement, and turned out not to be good. There was evidence that there was a custom among banks, which cleared notes through the clearing-house, fixing the time, within which the conditional payment of a note included in a clearing-house settlement, could be avoided

Digitized by Google

by the return of the note, or, in other words, when the conditional payment of such a note became absolute. As we understand the testimony, that there was such a custom was uncontradicted. Whether we have interpreted the report rightly in that connection may, perhaps, be open to question. The assistant manager of the clearing-house association testified that "There is a custom to return notes after one o'clock up to the time of closing of the bank; that would be up to two o'clock in case of the Atlas. I don't know of any established custom that extends the time for returning notes beyond two o'clock. I don't know of any custom that permits the return of a note after two o'clock. . . . There is a custom about charging notes through the clearing-house; I think it might be said to be nearly universal. But there are cases where they do not receive notes through clearing, among banks that are members of the clearing."

We understand this testimony to mean that the custom of banks, which are members of the clearing-house association, to clear notes held by them through the clearing-house, in place of presenting them for payment at the bank where they are payable, is not universal; but that the custom among those members of the association, which choose to clear their notes through the clearing-house in place of presenting them is universal, and that the custom is that if the notes are not returned before the time of closing of the bank, in case of the plaintiff two o'clock, the conditional payment becomes absolute.

With the single exception of the testimony of the cashier of the plaintiff bank, all the witnesses concurred in their testimony that under no circumstances did the time for returning a note continue beyond two o'clock or the business hours of the bank at which the note was payable. Some witnesses testified that the time was two o'clock, without reference to the business hours either of the bank at which the note was payable or the bank which held the note; others testified that it was the close of business hours of the paying bank; others testified that it was one o'clock, unless "time" was asked for, and if "time" was asked for, it was two o'clock.

In the case at bar, there was on the testimony no question but that the business hours of the plaintiff bank closed at two

Digitized by Google

o'clock; we do not regard the testimony of the cashier of the plaintiff bank that as a matter of courtesy some business was done after two o'clock as evidence that the business hours of that bank continued after that hour.

There was some testimony by the cashier of the plaintiff bank which was in conflict with that of the other witnesses. I refer to his testimony that if "time" was asked for and granted on a note which had gone through the clearing-house, the time for the return of that note was fixed at the time when the books of the paying bank were actually closed and the safe locked; that there was no regular time for the return of the note in such a case; and that it was the duty of the paying bank to return the note when it was found that it was not good. All the other witnesses testified that when "time" was granted, it meant until two o'clock; some of them testified that "time" was asked for because, unless "time" was granted, the time for the return of the note was one o'clock; and others testified that there was so much doubt as to whether, in the absence of the granting of "time," the time was one or two o'clock, that it was usual to get time, if the note was not returned by one o'clock.

The presiding judge made the following findings and rulings: "The association has not in writing established any rule regulating the return of 'other items,' including promissory notes, or limiting the time in which they may be returned. I find that it has not otherwise established such a rule. I find also that such a rule has not been established by a universal, uniform, and general custom, and rule that a custom, if one exists, to return such notes before the end of the business hours of the receiving bank would be bad, as being in derogation of law and of the rights of the parties, to whom the receiving bank would owe certain duties by reason of having the notes at its place of business for payment on the day when they became due."

The reason given in the report by the presiding justice for these rulings was: "The bank receiving the note for collection owes to the person depositing the note with it the duty of holding it and having it ready for delivery upon payment during the entire business day, and to the maker of the

Digitized by Google

note the duty of thus holding it for delivery to him during the entire time in which he has to pay it, that is, until the expiration of the last moment of the last hour of the business day at the bank at which it is made payable. The association has not in its printed rules undertaken to hold the receiving bank to a return of the note to the delivering bank before its dishonor, or make it incumbent upon such bank to violate its legal duty to its customers. It could not establish such a rule by agreement between its members, oral or written, or by a practice or usage, however general and uniform, and has in no wise attempted to do so. I rule, as matter of law, that the receiving plaintiff bank was under no legal obligation to return the notes in suit * to the respective delivering defendant banks until their dishonor at the expiration of the last moment of the hour expiring at two of the clock in the afternoon of the sixteenth day of June, the day upon which, it is agreed, both notes became due."

We are of opinion that these rulings were wrong.

It would be entirely proper for banks, which are members of a clearing-house association, to agree that a promissory note, included in the clearing-house settlement, and in that way conditionally paid without inspection, shall be returned as soon as it is found out that it is not a good item in that account, and to limit the time within which it can be returned, and to provide that if it is not returned within the time so fixed by the clearing-house, the conditional payment made without inspection shall be avoided and the parties left in the same position that they would have been in had the note not gone through the clearing-house and no conditional payment had been made. A promissory note may not be a good item in the clearing-house settlement, either because the account to the credit of the maker at the bank, where it is payable, is not large enough to pay it, or because the bank has no right to charge notes made by the depositor who was the maker of the note in question to his account without a check being drawn therefor or specific instructions being given to that effect, as was the

* This case was tried in connection with another action by the same plaintiff against the Merchants' National Bank involving a similar transaction with reference to a note made by the Western Rubber Company.



Digitized by Google

case in *National Exchange Bank* v. *National Bank of North America*, 132 Mass. 147.

If the members of a clearing-house association should provide in their rules that such notes must be returned by twelve o'clock, for example, and, if not so returned, the conditional payment would become absolute, the bank holding the note for collection would have two hours in which to present the note for payment. Such an article in the rules of the association of a clearing-house would not violate the rights of the holders of the note, or the duties which either of the banks owed to him. A bank holding a note for collection for account of one of its depositors does not violate the duty it owes to the depositor if (1) it presents the note for payment at any time during business hours, and, on payment being refused, protests it, as it may do for non-payment; or if (2) it leaves the note for collection at the bank at which it is payable without making a demand for payment. The duty imposed by law upon the receiving bank does not require that either of these acts should be done at any particular moment during the banking hours of the day on which the note is payable. Moreover, the rules of the clearing-house might provide that the paying bank, on discovering that the note was not a good item in the account, should be entitled to repayment of the amount thereof, on giving written notice to the bank in whose clearing-house account the note was included, and should then keep the note as a note left for collection without presentment for payment.

The ruling of the presiding justice is evidently based upon the decision in *National Exchange Bank* v. *National Bank of North America*, 132 Mass. 147. In that case the bank at which the promissory note was payable had no right to pay the note in question without a check from the maker of it; there was no request for time made by the bank at which the note was payable; the note was held until ten minutes before two o'clock, at which hour it was sent to the bank which held it for collection, after the bank at which it was payable had ascertained from the maker that the note would not be paid. The statement of the findings of the presiding justice before whom that case was tried, without a jury, is as follows: "The presiding justice has found specially, 'that a large number of the banks are in the habit of sending

Digitized by Google

their notes with their checks through the clearing-house for collection, and of returning them, if not paid, to the sending bank before one o'clock; but,' he adds, 'I do not find such to be the uniform and invariable custom. The plaintiff and defendant banks were so in the habit of sending and receiving notes through the clearing-house, and they generally returned them, if not paid, to the sending bank, before one o'clock, but this rule was not invariable. Some of the banks decline thus to send or receive notes through the clearing-house; and some of those who do thus send and receive them there, and among them the plaintiff bank, take back the notes, if not paid, after one o'clock.'" See *National Exchange Bank* v. *National Bank of North America*, 132 Mass. 147, 150. The case came up on a report in which these facts were set forth, and which provided that the plaintiff should recover unless as matter of law the plaintiff was not entitled to recover. This court held that the plaintiff was entitled to recover, and Endicott, J., in delivering the opinion of the court, stated that it was not within the course of business at the clearing-house that notes payable at a bank should be charged to that bank on the clearing-house settlement; that sending the notes through the clearing-house is merely a method for placing the note in the bank where it is payable to be collected in the usual course of business, and that the payment of such a note made in the clearing-house settlement "is to be treated as a payment made under a mistake of fact, to the same extent, and subject to the same right of reclamation, as if it had been made without the intervention of the clearing-house." p. 150.

The conclusion reached in that case on the facts there found by the presiding justice was undoubtedly correct, and the statement of the way in which the conditional payment of a note, made by its being included in a clearing-house settlement, was to be treated was also correct on the facts found. But it cannot fairly be taken to be a statement of the way in which a note included in a clearing-house settlement is to be treated in a case where the evidence as to the effect of including a promissory note in a clearing-house settlement is different from the evidence in that case.

In the case at bar the evidence on that point was different;

Digitized by Google

there was evidence in this case that the effect of including a promissory note in the clearing-house settlement is very different from what was found to be the effect thereof in *National Exchange Bank* v. *National Bank of North America*, and the way in which the note in question in this case was treated was very different from the way in which the note was treated in that case. In the case at bar, there was evidence that the note was, in fact, charged as conditionally paid on the books of the plaintiff bank; that "time" was asked on the note before one o'clock; that the cashier of the plaintiff bank tried to ascertain, just before two o'clock, whether the notes were or were not to be paid, and, failing to find the officer of the corporation which made the note, decided to pay the note to accommodate that corporation; and, in addition, there was evidence that there was a custom to this effect: if a bank which is a member of the clearing-house chooses to send its notes through the clearing-house, the notes are treated as conditionally paid, and if not returned at a fixed hour, that conditional payment becomes absolute; whether the hour fixed is one or two o'clock was left in doubt on the testimony.

In the case at bar there was evidence, apart from the evidence of custom, that it was impliedly agreed between the two banks in question that the note was to be treated as checks were treated, namely, as paid, if not returned, and that the effect of the granting of "time" was to fix the time, at which the conditional payment became absolute, at two o'clock. The fact that the note was sent through the clearing-house, followed by the fact that the plaintiff asked for "time," and that at three o'clock the cashier of the plaintiff bank told the assistant treasurer of the corporation which was the maker of the note that the note had been paid, was evidence on which a jury could have made a finding to that effect. In addition to this, there was evidence that there was a universal custom that if a bank, a member of the clearing-house, included promissory notes in the clearing-house settlement, they were to be treated as paid if not returned at some hour, either one or two o'clock, if "time" was not asked; and if "time" was asked and granted, not later than two. On this point there was conflicting testimony; but though there was a conflict, there was evidence that when "time" is given the conditional payment becomes absolute at two o'clock.

Digitized by Google

In the case at bar there was no mistake of fact and no evidence of a mistake of fact. If a check included in a clearing-house settlement is not returned within the time allowed, because of a mistake of fact, the paying bank can recover on that ground. *Merchants' National Bank* v. *National Bank of the Commonwealth*, 139 Mass. 513. But in this case there was no mistake of fact, and no recovery can be had on that ground. In spite of that, the presiding justice held that any custom or agreement, such as we have indicated there was evidence of in this case, would be void, that the sending of the note through the clearing-house was to be taken to be nothing more than a method of leaving the note with the paying bank for collection, and for that reason the payment made through the clearing-house could be recovered as a payment made through mistake of fact, though no mistake of fact really existed, and consequently that if the position of the defendant had not changed from that which existed when the note was dishonored by not being paid at two o'clock, the plaintiff could recover.

Under the terms of the report the correctness of these rulings is not before us; but inasmuch as these rulings are set forth at length in the report, we think it may have been the intention of the presiding justice to leave them open for argument. Under these circumstances, we think that the report should be discharged that the defendant may have an opportunity for presenting to the Superior Court a motion for an amendment of the report, or for such other action in the premises as it may be advised.

*So ordered.*

Digitized by Google

JOHN K. HAYWARD *vs.* JOSEPH R. LEESON.
SAME *vs.* JOHN HOPEWELL, JR.

Suffolk, December 12, 13, 1899. — June 15, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Corporation — Secret Profits made by Promoters — Fraud — Damages — Parties.*

Promoters of a corporation, who, before any capital stock has been issued to the public, cause to be issued to themselves, as a remuneration for their services as such promoters, by the vote of all persons who then had any interest in the corporation, they being the promoters, one third of the whole capital stock, and then issue a prospectus to the public inviting subscriptions to the stock without disclosing that fact, are guilty of a fraud, and are liable to a suit in equity, which should be brought in the name of the corporation and not in that of the receiver, to account for the net profits received by them, less the expenses of the formation of the corporation paid by them, the plaintiff having the option to follow the shares or the proceeds or to recover damages, and not being obliged to tender back the lands acquired by the corporation under a contract executed in pursuance of the vote above named; and the objections that the suit was being prosecuted for the benefit of certain persons to the exclusion of other creditors of the corporation, and that it was not proved that the persons named were creditors, are not tenable on the facts in this case.

TWO BILLS IN EQUITY, filed in the Superior Court, by the receiver of the East Tennessee Land Company, to recover alleged secret profits made by the defendants as promoters of that corporation. The cases were heard together before *Richardson* J., who reported them for the determination of this court. The facts appear in the opinion.

*W. H. Russell*, (of New York,) (*W. B. Winslow*, of New York, & *L. G. Farmer* with him,) for the plaintiff.

*A. Hemenway* & *I. R. Clark*, for the defendants.

LORING, J. These two cases were heard together in the Superior Court; certain findings on the material facts were made, which are set forth in a report, and the questions of law arising thereon were reserved for this court.

The suits were begun by the receiver of the East Tennessee Land Company, an insolvent corporation, to recover from the defendants secret profits made by them as promoters of that company.

Digitized by Google

By a confidential circular dated March 25, 1889, the Phœnix Land Company proposed to the defendants and eight other persons that they should associate themselves together as a Syndicate of Ten to advance to the Phœnix Land Company from $15,000 to $30,000, which should be used in obtaining options on some 225,000 to 300,000 acres of land in three specified counties in the State of Tennessee; these lands were stated in the circular to be underlaid in part with iron and in part with coal, to be well wooded, to have a soil of fair agricultural value, and to have the most healthful average climate of the South, and therefore appropriate for a health resort for the South in summer and for the North in winter; that the price for which they could be obtained was about $800,000, to which should be added $100,000 for possible expenses, and that they were really worth $1,500,000, showing a profit of $600,000. It was proposed that options on these lands should be obtained in the name of the Phœnix Land Company, and when the options were obtained, a thorough investigation should be made and the opinion of an expert obtained as to their value; that the Phœnix Land Company and the Syndicate of Ten should then organize a corporation, and, through subscriptions to its capital stock made by the public and secured by means of a prospectus, the corporation would be able to, and should, buy the options at a price fixed by the two parties to the enterprise, the Phœnix Land Company and the Syndicate of Ten, and the net profits, after paying all actual expenses incurred, should be divided between the two.

The Phœnix Land Company was a corporation organized under the laws of the State of Tennessee, on March 15, 1889, — just ten days before the date of the circular mentioned above, — by Frederick Gates, his son R. W. Gates, his two partners in the real estate business at Chattanooga, A. W. Sidebottom and O. F. Jaynes, together with one Alphonso A. Hopkins of Elmira in the State of New York. These five men were all the incorporators, directors, or subscribers to stock in said corporation, and "it does not appear that any stock of said Phœnix Land Company was actually issued, or that it had any paid-up capital stock at any time, or that it owned any land."

The defendants, together with eight other persons, accepted this proposal, and an agreement between the Syndicate of Ten

Digitized by Google

and the Phœnix Land Company was completed May 6, 1889; this agreement is spoken of in the report, as paper No. 31, and as the agreement of March 25, 1889, and it included a paper referred to in the report as "The Plan more in detail." The plan laid out in this agreement was substantially carried into effect; it was departed from in this, that the parties organized the corporation which was to purchase the options from them at an advance, when they had obtained options on about one third of the lands which they proposed the company should ultimately own, in place of waiting until options on all the lands had been secured. The certificate of incorporation of the new company was issued on May 25, 1889, and its name was the East Tennessee Land Company. The purchase price of the land on which the parties had then secured options was $322,694, of which the Phœnix Land Company had paid $6,008, leaving $316,686 to be paid. On June 6, the incorporators of the Phœnix Land Company subscribed individually to shares in the East Tennessee Land Company, to the amount of $250,000 par value; the members of the Syndicate of Ten also subscribed to shares to the same amount, and the Phœnix Land Company, in its corporate name, subscribed to shares to the amount of $200,000 par value. In addition, shares amounting to $10,000 were subscribed by one Mason, in whose name some of the options subsequently secured were taken.

There were thirteen incorporators of the East Tennessee Land Company. Gates and one of his associates were two; ten of the members of the Syndicate of Ten, together with the said Mason, made the thirteen; it appears that one of the original members of the Syndicate of Ten divided his interest in two, so that there were ultimately eleven members in the syndicate of Ten, two of them having a half share each.

On June 10, 1889, the first meeting of the stockholders of the East Tennessee Land Company was held, and all the incorporators and stockholders were present in person or by proxy. At this meeting it was voted that the corporation should make a contract with the Phœnix Land Company whereby, in consideration of the Phœnix Land Company's assigning all options then held or thereafter acquired by it, and of its agreeing to secure further options at the expense of the East Tennessee

Digitized by Google

Land Company, during the ensuing six months, the East Tennessee Land Company should agree: (1) To pay all expenses of the Phœnix Land Company in procuring further options under the contract; (2) To pay all sums due as purchase money under the options assigned to it, whether then owned or thereafter acquired; and (3) To issue to the Phœnix Land Company paid-up shares in its capital stock to the amount of $700,000. This contract was executed on the next day, June 11, 1889. The stockholders also passed a resolution instructing the secretary, on this contract being executed by the Phœnix Land Company, to issue to it paid-up shares to the amount of $200,000 par value, and to issue such shares to the amount of $500,000 par value to persons presenting orders therefor from the Phœnix Land Company, charging the same to the Phœnix Land Company. On or about July 3, 1889, Gates and his associates in the Phœnix Land Company presented orders from the Phœnix Land Company for shares to the amount of $250,000, and certificates therefor were issued to them; at the same time, the defendants, with their associates in the Syndicate of Ten, presented orders for the issue to them of shares to the amount of $250,000, and certificates therefor were issued to them; the Phœnix Land Company did not originally take out certificates for the $200,000 of shares which were to be issued to it, but they were subsequently issued from time to time to persons to whom they were sold by it.

In December, 1889, the East Tennessee Land Company issued a prospectus inviting subscriptions to the capital stock of the corporation. In this prospectus it is stated, among other things, that "The capital stock of this company represents actual value without inflation, but does not approximate the entire value of the properties on which it is based. It was the intention of the projectors and incorporators to shape this enterprise so that its stock should be as solid as that of a national bank. Over half a million dollars of its capital were subscribed before the company's organization, at par. Subscriptions for the remainder are now solicited." And no other reference was made to the fact that the $700,000 of paid-up shares in question had been subscribed for, and no statement was made as to the way in which those $700,000 of shares had been paid for and issued.

Digitized by Google

"Large tracts of land were, in 1889, 1890, 1891, 1892, purchased by the East Tennessee Land Company . . . , and during said years it had laid out and made streets on such lands purchased by it, erected buildings, and started manufacturing industries, so that where there was a population of less than one hundred and three or four poor buildings on June 1, 1889, there was on June 1, 1893, a population of about four thousand and several hundred buildings. . . . The amount of stock issued by the East Tennessee Land Company in all to subscribers and purchasers was approximately two million dollars par value, including the $700,000 issued" under the contract of June 11. The East Tennessee Land Company also issued its mortgage bonds, dated October 1, 1890, to the amount of $1,000,000.

On November 18, 1893, one Schumacher filed a bill in equity in the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee, in behalf of himself and all other unsecured creditors of the East Tennessee Land Company, alleging that the company was insolvent, and praying that its property might be realized and the proceeds distributed among its creditors; in this suit receivers were appointed to take possession of all the property of the corporation. The Central Trust Company of New York, the trustee named in the mortgage given to secure the bonds of the East Tennessee Land Company, filed a bill to foreclose that mortgage on March 11, 1894, the two causes were consolidated, and the receivership was extended to the consolidated cause. The consolidated cause was referred to a master; upon the coming in of the master's report a decree was entered on February 27, 1897, establishing the validity of the mortgage, ascertaining the debts thereby secured and the other debts of the corporation, directing the property of the corporation to be sold, and decreeing the order of distribution of the proceeds derived therefrom. By this decree it was found that the debt of the East Tennessee Land Company at that time was as follows: (1) Mortgage debt, $1,164,836.58; (2) Vendors' lien on company's land, $165,233.81; (3) Secured debt, $202,409.09, and unsecured debt, $224,818.04; amounting to $1,757,297.52, and, in addition, $9,631.10, due on receivers' certificates issued to raise money to pay taxes. The report on which this case comes up from the Superior Court

Digitized by Google

states that the gross sum realized by the sale of the property of the East Tennessee Land Company, under the decree of February 27, 1897, was $125,372.50. On May 20, 1895, an order was made in the consolidated cause directing the receivers to institute certain proceedings, and, among others, the two suits now before this court. The prosecution of these suits was subsequently suspended by order of the court; but on July 1, 1897, an order was made directing the receiver to proceed with the prosecution thereof.

Stripped of the surroundings which tend to obscure its real nature, the transaction in which the defendants took part was this: Gates and his four associates, and the defendants and their nine associates, believing that a tract of some 225,000 to 300,000 acres of land in Tennessee had natural resources which could be developed at a great profit, agreed to join themselves together to secure options on the land, and then organized a corporation which was to buy the options of them at a profit; this profit, after paying all actual expenses incurred in procuring the options and organizing the corporation, was to be divided equally between Gates and his associates operating under the name of the Phœnix Land Company, and the defendants and their associates operating as the Syndicate of Ten. In this joint adventure Gates and his associates contributed their information as to the land, and the defendants and their associates contributed the money ($15,000 to $30,000) to be advanced for the expenses of the enterprise, until the corporation to be organized was organized and was in funds, when these advances were to be repaid by it. It was stated in the agreement providing for this joint adventure that the profit which they would secure from the corporation for the transfer of these options would be some $700,000; the cost of the lands being estimated to be $900,000, including $100,000 for expenses, and the value of the lands to the corporation being stated to be $1,500,000; if the $100,000 of expenses included in the $900,000 were repaid to them, the difference between the two, that is to say, the net profit to the promoters of the corporation, would be $700,000; it was also agreed that "at least five sixths of its net profit shall be taken by each of these two contracting parties in stock of the new corporation."

Digitized by Google

The only particulars in which the promoters departed from this plan, in carrying it into effect, were that they organized the corporation when only one third of the options contemplated had been secured, and that they then issued to themselves $700,000 of paid-up stock of the corporation as the net profits which they were to make in the transaction. Nominally, this $700,000 of paid-up stock was issued in payment for options then owned by the Phœnix Land Company, on which it had paid $6,000, and the agreement of that company to secure further options during a period of six months, at the expense of the new corporation. Really this $700,000 of paid-up stock was issued to the promoters as remuneration for their services as promoters, or, as it is termed in the report of the Superior Court, for the net profits which it was arranged in the agreement between the Phœnix Land Company and the Syndicate of Ten should be divided equally between the two; the twenty-first finding of the Superior Court is explicit on this point; it is, so far as material in this connection, as follows: "The sum named, $700,000, was not arrived at by any appraisal or attempted appraisal or valuation of any property, options, or contracts, or title bonds, etc., which the Phœnix Land Company had. . . . Said large sum was named as a consideration that it might be enough to include the 'profits' mentioned or contemplated in said paper marked 'No. 31,' and especially in clause 3 of the 'plan more in detail.' And the shares received by all the said syndicate members and some others on July 3 were then really understood to be the profits or 'net profits' mentioned in the ninth clause of said paper marked 'No. 31,' and in the third and sixth clauses of the 'plan more in detail' annexed thereto, which by that agreement were to be divided between the ten syndicate members and the Phœnix Land Company; and this also was known to all the then stockholders of the East Tennessee Land Company, to wit, the thirteen directors of the East Tennessee Land Company and the officers of the Phœnix Land Company." The paper referred to in the report as paper marked "No. 31," and the "plan more in detail" annexed thereto, make up the agreement between Gates and his associates and the defendants and their associates, which was finally completed on May 6, 1889.

Digitized by Google

The defendants rely in this connection upon two of the findings set forth in the report, namely, (1) that the vote authorizing the contract of June 11 was passed "and the contract executed by which the East Tennessee Land Company agreed to pay said $700,000 for the lands, options, contracts, and title bonds of the Phœnix Land Company, with and upon the theory and belief — under advice of competent counsel practising in Tennessee to that effect — that it would satisfy the laws of Tennessee, both as to the payment in of the capital of said corporation, and would, by orders of the Phœnix Land Company, be a proper way and method of settling for the shares of stock which each of the defendants and others subscribed for and got"; and (2), "I do not find that the defendants or either of them in signing the paper marked 'No. 31,' or in signing the subscription for stock on June 6th, and in becoming directors of the East Tennessee Land Company on June 10th, and in voting for the making of the contract with the Phœnix Land Company, and in taking, each, 250 shares of stock, intended any actual fraud, or intended to defraud or cheat either the corporation or the future stockholders or creditors of the East Tennessee Land Company. They did not anticipate the failure or insolvency of the company; whatever those who originated the project expected, these defendants when they became parties to it believed (and I think not without some reason, with proper management) that it would succeed, and result in building up a prosperous town or city at Harriman." And the defendants contend that the stock issued to them was lawfully issued for interests in land and for services rendered or to be rendered; that under these findings there was no fraudulent overvaluation in the issuing of the $700,000 of shares of stock; that the issue of this stock was voted for by the defendants and others as stockholders, and that stockholders are under no fiduciary relation to anybody, and can do as they will with their own; and, moreover, that it was consented to by all the stockholders and incorporators of the East Tennessee Land Company, and consequently cannot now be made the basis of any complaint by the corporation or anybody else.

But this argument omits from the case the fact that the defendants, together with their associates in the Syndicate of Ten, and Gates with his associates in the Phœnix Land Company,

Digitized by Google

were promoters of the East Tennessee Land Company, and that these suits are instituted to charge them with secret profits made by them as such promoters, and not on the ground that the stock subscribed for by them has not been paid for under the laws of Tennessee; whether it was or was not properly issued as paid-up stock so far as a compliance with Tennessee statutes is concerned, is not material, and we express no opinion upon that point. See *McKay's case*, 2 Ch. D. 1, 6, 8. Moreover, it is not sought, in these suits, to charge the defendants because they voted as stockholders to issue the $700,000 of stock; but it is sought to charge each defendant because he, with others, was a promoter of the East Tennessee Land Company; because as a promoter he stood in a fiduciary relation to the future shareholders of that corporation, and by reason thereof he could not receive any remuneration for his services as a promoter of that corporation without making a full disclosure thereof, and obtaining the consent of those shareholders thereto. *McKay's case*, 2 Ch. D. 1. *Bagnall* v. *Carlton*, 6 Ch. D. 371. *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918. *Emma Silver Mining Co.* v. *Lewis*, 4 C. P. D. 396. *Whaley Bridge Calico Printing Co.* v. *Green*, 5 Q. B. D. 109. *Lydney & Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85. *Bland's case* [1893], 2 Ch. 612. *Archer's case*, [1892] 1 Ch. 322. *Hichens* v. *Congreve*, 4 Russ. 562; *S. C.* 1 Russ. & Myl. 150, *n.* *Beck* v. *Kantorowicz*, 3 K. & J. 230. *Pearson's case*, 5 Ch. D. 336. *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394. *Yale Gas Stove Co.* v. *Wilcox*, 64 Conn. 101. *Plaquemines Tropical Fruit Co.* v. *Buck*, 7 Dick. 219. *Chandler* v. *Bacon*, 30 Fed. Rep. 538. See also *Emery* v. *Parrott*, 107 Mass. 95. That a promoter stands in a fiduciary relation to the future shareholders, see *Venezuela Railway* v. *Kisch*, L. R. 2 H. L. 99; *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73; *Erlanger* v. *New Sombrero Phosphate Co.* 3 App. Cas. 1218; *Densmore Oil Co.* v. *Densmore*, 64 Penn. St. 43; *Bosher* v. *Richmond & Harrisonburg Land Co.* 89 Va. 455, 460, 461; *Pittsburg Mining Co.* v. *Spooner*, 74 Wis. 307; *Burbank* v. *Dennis*, 101 Cal. 90, 98; *South Joplin Land Co.* v. *Case*, 104 Mo. 572.

If the fullest effect is given to the finding of the court, that the defendants intended no actual fraud in taking two hundred and fifty shares each, and did not intend to defraud or cheat

Digitized by Google

either the corporation or the future stockholders or creditors of the East Tennessee Land Company, all that the finding means is that the defendants honestly believed that the natural resources of the lands in question were so great, that shares amounting to $700,000 par value would be a fair remuneration to be paid to them and their associates, for their services as promoters. But even if they did so believe and their belief was honest, and there was a foundation for that honest belief, they none the less were guilty of a fraud; it is a fraud for promoters to undertake to decide for the future stockholders in the corporation to be organized that one third of the whole capital stock of that corporation is a fair remuneration for their services as promoters, to issue one third of the capital stock to themselves as such remuneration, and then to invite the public to subscribe to the stock of the corporation, without disclosing that fact to the subscribers and without getting their consent to the payment of that remuneration.

The defendants say that they did disclose the fact to the East Tennessee Land Company, and that they did get the consent of the East Tennessee Land Company to the payment of this $700,000 of stock to them for their remuneration as promoters; and that is not only enough, but it is final. It is true that the vote, authorizing the issue of this stock to them as the profits which they were to have for the organization of the company, was voted unanimously by all the incorporators of the East Tennessee Land Company and by all, who were then subscribers to its capital stock, that is, by all the persons who then had any interest in that corporation, in short it is true that the fact, that the promoters were to receive $700,000 of paid-up capital stock as remuneration for their services, was disclosed, and consented to, by all the persons who then had any interest in the corporation. But it is also true that at that time no person except the promoters had any interest in the corporation, barring one Mason, in whose name some of the options were subsequently taken, and who was plainly a mere nominee of the promoters; and that at that time no capital stock of the corporation had been issued to the public. Payment to promoters of remuneration for their services is not made valid by a vote passed by the corporation, when the corporation is in the sole

Digitized by Google

control of the promoters before the capital has been issued to the public. *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73. *Erlanger* v. *New Sombrero Phosphate Co.* 3 App. Cas. 1218. *In re Olympia* [1898], 2 Ch. 153. *In re British Seamless Paper Box Co.* 17 Ch. D. 467, 471, 472. The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders. It is to the future stockholders that the promoters must make the disclosure of the remuneration which is, or is to be, paid to them, and it is the consent of the future stockholders that must be obtained to make that payment valid; if the promoters undertake to make to themselves remuneration for their services as promoters without making a full disclosure of the fact to the future stockholders, their principals, and getting their consent, they are guilty of a fraud. Promoters can make the necessary disclosure of the remuneration they stipulate for by including in the prospectus a full statement thereof; if such a statement is not made therein, they cannot honestly take any remuneration for promoters' services, unless it is voted by the stockholders after the capital stock has been taken by the public.

In this case it is found that "neither of the defendants personally did anything to conceal the paper marked 'No. 31,' the agreement of March 25th, or took any part in concealing or keeping it from the knowledge of future stockholders or creditors of the corporation. I find, however, that as a fact it was kept from the knowledge of the stockholders other than the thirteen directors aforesaid, and of future creditors, probably by the original inventors of the scheme, — the officers of the Phœnix Land Company, — until after the failure of the East Tennessee Land Company." That finding is conclusive of the defendants' liability; but there is a further finding which gives to the defendants' actions a more serious character, and that finding is this: "The prospectus made an exhibit to the deposition of A. A. Hopkins was issued with the consent and approval of the defendants Leeson and Hopewell, and was widely circulated among the general public." That prospectus contains the following statement: "The capital stock of this company repre-

Digitized by Google

sents actual value without inflation, but does not approximate the entire value of the properties on which it is based. It was the intention of the projectors and incorporators to shape this enterprise so that its stock should be as solid as that of a national bank. Over half a million dollars of its capital were subscribed before the company's organization, at par. Subscriptions for the remainder are now solicited." The defendants, therefore, not only did not disclose to their principals the fact that stock to the amount of $700,000 par value was issued to them and their associates as remuneration for promotion services, but a prospectus containing an incorrect and misleading, if not false, statement was issued with their consent and approval.

The defendants' next contention is that the action cannot be maintained until the East Tennessee Land Company tenders back to the Phœnix Land Company the lands acquired by it under the contract of June 11. But this is not a suit to recover damages from promoters for fraud in a sale of their property to the corporation organized by them as promoters; if it were, it is clear that it could be maintained without returning the lands which had been bought; if at the time when a fraud is discovered, which was perpetrated by promoters in a sale to the corporation of property owned by them, the property is no longer in the condition in which it was when the company took it, the company may, keeping the property, sue the promoters for the secret profits which it was their duty not to make without notifying the company thereof. *In re Olympia* [1898], 2 Ch. 153.

In the case at bar, the Phœnix Land Company has never been anything but a paper corporation, with five of the promoters of the East Tennessee Land Company as its incorporators, without capital stock, and without property. The lands bought by the East Tennessee Land Company were bought by that company from strangers who owned them. The suggestion that the East Tennessee Land Company must turn over to the Phœnix Land Company the lands which it bought of strangers means that the East Tennessee Land Company must turn over its lands to the promoters of the East Tennessee Land Company; the Phœnix Land Company was merely the paper corporation under whose shelter the promoters sought to obscure the real nature of their



Digitized by Google

transactions. That the corporation may sue for the secret profits made by a promoter who secured a sale of lands from a third person to the corporation without returning the lands obtained by means thereof, is well settled. *Emery* v. *Parrott*, 107 Mass. 95. *Lydney & Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85, 94. *Emma Silver Mining Co.* v. *Lewis*, 4 C. P. D. 396.

In case of such a fraud by promoters, the corporation is entitled to follow the shares taken by the promoters or the proceeds thereof in the hands of the promoters, and to recover them specifically, or to recover damages for the loss thereof. *Carling's case*, 1 Ch. D. 115, 126, 127. *Nant-y-glo & Blaina Ironworks Co.* v. *Grave*, 12 Ch. D. 738, 747, 748. *Eden* v. *Ridsdales Railway Lamp & Lighting Co.* 23 Q. B. D. 368, 371, 372. *Pearson's case*, 5 Ch. D. 336, 341. *Chandler* v. *Bacon*, 30 Fed. Rep. 538. Promoters who have wrongfully taken remuneration for their services and have paid the promoters' expenses and the expenses of organizing the corporation are entitled to deduct those expenses in an accounting with the corporation. *Bagnall* v. *Carlton*, 6 Ch. D. 371, 400, 403, 407, 408. *Emma Silver Mining Co.* v. Grant, 11 Ch. D. 918, 939. *Metropolitan Coal Consumers' Association* v. *Scrimgeour* [1895], 2 Q. B. 604. In this case it appears by the seventeenth finding that all payments made in procuring the options after June 11, 1889, were repaid by the East Tennessee Land Company, but it does not appear that the $6,008 prepaid purchase money expended under options held by the Phœnix Land Company on June 10, 1889, has been repaid; and there may be other expenses incurred by the promoters in the name of the Phœnix Land Company or otherwise in organizing the company, which, if not heretofore repaid to them, should be deducted by them in an accounting with the company.

The plaintiff claims that under the twenty-fifth finding of the Superior Court he is entitled to a decree against each defendant for $25,000 and interest, less his share of the expenses, which we have already dealt with. If the balance of this stock amounting to $1,300,000 par value had been subsequently issued for cash at par, the plaintiff would be entitled to such a decree. Ordinarily the damages are to be assessed as of the date of the taking; yet when, as in this case, the property taken had no value at that time, because it was stock of a corporation not then launched

Digitized by Google

into being, the date must be carried forward to the date when the value of the stock was fixed. See *Carling's case*, 1 Ch. D. 115, 126; *McKay's case*, 2 Ch. D. 1; *Pearson's case*, 5 Ch. D. 336; *De Ruvigne's case*, 5 Ch. D. 306; *Eden* v. *Ridsdales Railway Lamp & Lighting Co.* 23 Q. B. D. 368; *Chandler* v. *Bacon*, 30 Fed. Rep. 538; for cases in this Commonwealth where the value at some date other than the date of the wrongful conversion has been taken in actions to recover damages for the wrongful conversion of personal property, see *Fowle* v. *Ward*, 113 Mass. 548; *McKim* v. *Hibbard*, 142 Mass. 422.

But we are of opinion that the twenty-fifth finding ought not to be acted on as a finding warranting that decree; it is not in terms a finding as to the market value of the stock, neither is it in its terms a satisfactory finding, and it was not made in the light of the principles which it is now established govern the defendants' liability. The case therefore must stand for a hearing as to what the net profits are for which these defendants must severally account. At that hearing the plaintiff may follow the shares or the proceeds, or recover damages, as he may elect one or the other remedy. The defendants must account for the shares with the dividends received by them, or the proceeds with interest from the date when the proceeds were received by them, or for the fair market value of the stock with interest from the date when the market value may be found to have been established, as the plaintiff may have elected to proceed; and in any event the plaintiff must repay to the defendants or deduct from the sum due them the defendants' share of the expenses of the formation of the corporation paid by them and not heretofore repaid to them.

By the frame of the bills in equity in these two cases, and from the scope of the argument made in behalf of the plaintiff, the relief which the plaintiff seeks to recover from each defendant is limited to the two hundred and fifty shares issued to him, and the plaintiff does not seek to recover the one tenth of one half of the two hundred shares of stock originally subscribed for by the Phœnix Land Company, to which each defendant was entitled under the agreement between the Phœnix Land Company and the Syndicate of Ten by providing that all profits should be divided equally between the two contracting parties,

Digitized by Google

the Phœnix Land Company and the Syndicate of Ten. Nor does the plaintiff seek to recover the fifty shares received by each of the defendants, being one tenth of one half of the one hundred thousand shares issued to the Phœnix Land Company, under the adjustment of May 6, 1890, referred to in finding thirty-four. And lastly, from the frame of the bills, the plaintiff seeks to charge each defendant severally, and not to charge the defendants as jointly and severally liable with the other promoters for all secret profits received, whether received by them or their associates. *Bagnall* v. *Carlton*, 6 Ch. D. 371, 390, 411. *Bland's case* [1893], 2 Ch. 612. *Emery* v. *Parrott*, 107 Mass. 95, 103. For these reasons we do not express any opinion on these matters, and we have limited, as stated above, the matters, on which the case is to stand for hearing under the present bills.

The last objection made by the defendants is that the plaintiff as receiver cannot bring the suit in his own name; and we think that this objection is well taken.

The final order directing the receiver to prosecute these suits is as follows: "Said Jno K. Hayward, receiver, be and is hereby directed to proceed with said causes in the courts of Massachusetts, either in his own name as receiver, or in the name of the East Tennessee Land Company, or jointly in his name as receiver and in the name of the East Tennessee Land Company, as he may be advised by counsel to be proper, and in accordance with the rules of practice in the courts in which such cases are being prosecuted." This order does not operate as an assignment to the receiver of these choses in action. Neither did the previous orders, under which this receiver was acting, operate as an assignment of them; the plaintiff was appointed a receiver by order dated April 20, 1897, providing that he should "possess the power and authority conferred by former orders" on the receivers; the original order appointing receivers under the general creditors' bill provided that the receiver should "collect, take possession of, preserve and care for all of the property, real, personal and mixed, bonds, notes, bills, drafts, and other choses in action of the defendant wherever found, as well as of the accounts, books and papers of the defendant, and . . . hold and dispose of the same under the order of this court." There is nothing in the original order under which the bills in equity in

Digitized by Google

the cases at bar were filed which in any way affects this question. The plaintiff, as receiver, by virtue of these orders, has the powers usually conferred by a court of equity upon a receiver to preserve property pending litigation, and nothing more. Mr. Justice Gray, speaking for the Supreme Court of the United States of the powers of a receiver under a similar order, said: "The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property." *Union Bank of Chicago* v. *Kansas City Bank*, 136 U. S. 223, 236. That such a receiver cannot sue in his own name to enforce a right of action of the corporation is settled. *Wilson* v. *Welch*, 157 Mass. 77.

There is nothing in the objection that by the terms of the orders of the United States Circuit Court for the Southern Division of the Eastern District of Tennessee these suits are now being prosecuted for the benefit of the Harriman Land Company and one Rhodes, to the exclusion of other creditors, if any, of the East Tennessee Land Company, and the further objection that it was not proved in the suits now before the court that the Harriman Land Company and Rhodes were creditors of the East Tennessee Land Company. This is a fact, and the fact came about in the following way: The receivers of the East Tennessee Land Company were originally appointed under the general creditors' bill. When a bill was filed to foreclose the mortgage of the East Tennessee Land Company, the two causes were consolidated and the receivership was extended to the consolidated cause. The bill to foreclose was terminated by a decree directing a sale of the property, and after that decree had been carried into effect, the trustee of the mortgage filed a motion asking that the receiver should be discharged, or that it, the trustee, be absolved from costs of the receivership thereafter incurred. On this motion, the court entered an order directing that the costs and expenses of the receiver thereafter incurred should in no event be taxed to the plaintiff, the trustee of the mortgage, and directing that the funds theretofore realized should not be used to pay those costs and expenses. The order then recited that, as the receivership was continued to enforce

Digitized by Google

claims for secret profits, which claims would inure to the benefit of the general creditors, to the exclusion of the trustee of the mortgage, who disclaimed any interest therein, the receivership should continue only if the general creditors should give security for the payment of the receivers' expenses in those suits, and that the proceeds of those suits should be divided among those creditors who gave that security. In a general creditors' bill, only those creditors who come in under the decree and contribute to the suit are entitled to the fruits of the litigation, and the order of the Circuit Court in this connection was, under the circumstances, the only order which it could pass. Whether the Harriman Land Company and Rhodes are creditors of the East Tennessee Land Company is a question for the United States Circuit Court for the Southern Division of the Eastern District of Tennessee, and not for this court, (*McCarty's appeal*, 110 Penn. St. 379,) and the decision of that court on that point could not be attacked collaterally in these suits.

Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward, the causes are to stand for hearing as to what the net profits are, which the defendants have respectively received, or as to what the damages are, which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds on the one hand, or for damages on the other hand. *Decree accordingly.*

---

TIMOTHY J. HARTNETT *vs.* WILLIAM N. GODDARD.

Suffolk. January 11, 12, 1900. — June 19, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Libel — Evidence.*

In an action for libel against a member of an association, who set in motion the machinery of the association which contemplated that a person who did not pay his debts could not buy of members of the association except by paying cash before delivery, if the answer avers that the alleged libellous matter was true, and was published without malice, the defendant may testify to his purpose in forming and carrying on the association.

If the plaintiff, during his examination of the defendant as a witness, opens the

Digitized by Google

matter of what the latter's intention was in doing the act complained of, which consisted in setting in motion the machinery of an association of which he was a member, his counsel properly is allowed, in the discretion of the judge, to ask him whether he intended that the members of the association should do anything more than was provided by its by-laws.

In an action for libel against a member of an association, who set in motion the machinery of the association which contemplated that a person who did not pay his debts could not buy of members of the association except by paying cash before delivery, if the secretary of the association, who is called as a witness for the plaintiff, identifies several circulars and letters referred to in the declaration, as well as others relating to the process of dealing with the plaintiff through the association, the defendant properly is permitted to examine him upon the practice of the association in regard to arbitration in case of differences, though no evidence has been put in that either party has requested or submitted to arbitration in regard to such differences.

TORT, in three counts, for libel and malicious injury to the plaintiff's business. The answer contained a general denial, and set out that the alleged libellous matter was true, and was published without malice, and also that it was a privileged communication. Trial in the Superior Court, before *Sherman*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that the defendant was a member of the Plumbers' Supply Association of New England, a corporation formed under the laws of this Commonwealth for the purpose, as stated in its certificate of incorporation, "of promoting pleasant relations among its members; discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business; and establishing and maintaining a place for social meetings"; that among its by-laws was the following: "Usage and Custom. It shall be the duty of members of this association, in order to promote uniformity and certainty in the usage and custom in the trade, and to conform to the same, to sell only for cash paid before delivery, to customers who have unjustly failed to meet their trade contracts and obligations, and so long as that failure continues"; and that the association had established an elaborate system of notices, letters, and circulars concerning delinquent debtors of members of the association, to compel them to settle their accounts with the members, substantially as follows: (1) A letter to be addressed by the member to his debtor, calling his attention to the unpaid account and notifying him that if it is not paid in ten days it will be referred to the association; (2) a letter to be addressed

Digitized by Google

by such member to the secretary of the association, calling attention to the fact that a designated debtor of the member is delinquent and has been notified of his delinquency; (3) a letter of the secretary to the delinquent debtor, notifying him that unless he pays up within ten days from date the members of the association will be notified of the same, and in consequence thereof the debtor may be unable to purchase any goods from any of them except for cash before delivery; and (4) such delinquency continuing the time mentioned, and the debtor making no response, a letter from the creditor to the secretary of the association requesting him to notify every member. Thereupon the secretary gives such notice, and the name of such delinquent debtor is entered upon a book of delinquents to be kept by each member for that purpose, who thereafter refuse to deal with the delinquent except for cash before delivery.

It also appeared that the plaintiff was a retail plumber, who had previously traded with the defendant, and had paid his previous accounts with the defendant; and that in November, 1895, he was owing the defendant on a subsequent account a balance of $500 and over, when a question arose between the parties, which formed the basis of the defendant's acts, of which the plaintiff complains.

There was evidence tending to show that the plaintiff had been in his business for many years; that in 1889 he met with reverses which compelled him to compromise with his creditors, and had recovered in part from such reverses at the time he traded with the defendant, with all of which the defendant made himself acquainted by investigation before trading with him; that the plaintiff's total business at the time, and for some time prior to the transactions with the defendant, was about $7,000 or $8,000 a year; and that since the acts of the defendant complained of, the plaintiff's business had dwindled to nothing. There was conflicting testimony as to whether the plaintiff's loss of business was or was not ascribable to the defendant's acts.

The defendant, who was called as a witness by the plaintiff, was asked by his own counsel the following question: "You were one of the original members of the Plumbers' Supply Association, were you?" To which he answered, "Yes."

Digitized by Google

The defendant was then asked, against the plaintiff's objection, the following questions: "Was there any ulterior purpose on your part in forming the association beyond what was stated in the by-laws and charter? Whether or not, after the association was formed, and down to the time when you sent the notices, which appear in evidence, to Mr. Dupee concerning Mr. Hartnett, from the time Mr. Dupee sent out the other notices to Mr. Hartnett, anything had occurred which had led you to think that what you were doing was illegal or unlawful?"

Each question was answered in the negative; and the plaintiff excepted to its admission.

The following question was put to the defendant: "What was your understanding from what you knew of the business of the association and the way in which it was conducted, and the practices of the association and its by-laws, — what would be the course of business in case Mr. Hartnett, in response to this circular sent out by Mr. Dupee [circular exhibited], and the one of similar tenor previously sent, had notified Mr. Dupee that he disputed the account? What would then be the course about sending out any notice to the members of the association?" This question was objected to by the plaintiff, but was allowed; and the defendant answered, "I would be notified by Mr. Dupee that the account was disputed, and no notices would be sent out to the members till the account was finally adjusted." The plaintiff excepted.

During the course of the defendant's examination by the plaintiff he was asked if his proceedings, through the association, were not intended to compel the plaintiff to pay the defendant's demand, by depriving the plaintiff of his credit and bringing him into disrepute among other members of the association; and the defendant answered affirmatively.

His counsel then asked him: "You answered, in response to Mr. Dudley's questions as to what you intended should be understood by the members of the association on receipt of the notice; whether or not you intended that the members of the association should do anything more than was provided by the by-laws of the association, namely, cease to supply him with goods except for cash." The plaintiff objected to this question, but the judge admitted it. The defendant answered in the negative; and the plaintiff excepted.

Digitized by Google

John B. Dupee, who was the secretary of the association, was called as a witness for the plaintiff, and identified several circulars and letters referred to in the plaintiff's declaration, as well as others, relating to the process of dealing with the plaintiff through that association. The defendant was then permitted to examine him upon the practice of the association in regard to arbitration between the retail plumbers and the members of the association in case of differences, though no evidence had been put in on either side that either of the parties had requested or submitted to arbitration in regard to such differences; and the plaintiff excepted.

The case was submitted to the jury under instructions not excepted to.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

*H. Dudley*, (*S. H. Dudley* with him,) for the plaintiff.

*H. R. Bailey*, for the defendant.

LATHROP, J. This case in some respects resembles *Weston* v. *Barnicoat*, 175 Mass. 454, and in other respects differs from it. The machinery of the association, which the defendant, who was a member thereof, set in motion, did not contemplate an absolute boycott, as in *Weston* v. *Barnicoat*, but merely that a person who did not pay his debts could not buy of members of the association, except by paying cash before delivery. The bill of exceptions states that when the question arose between the parties, which formed the basis of the defendant's acts, the plaintiff was owing the defendant $500 and over. As we understand the somewhat lengthy declaration, in several counts, the plaintiff complains that what was done amounted to a false, scandalous, and malicious libel.

The answer was a general denial, with an allegation that the alleged libellous matter was true, and was written without malice, and also that it was a privileged communication.

The exceptions state that there was conflicting testimony on the point as to whether the plaintiff's loss of business was or was not ascribable to the defendant's acts. The jury found for the defendant, under instructions to which no exceptions were taken; and the only exceptions are to matters of evidence.

Under the Pub. Sts. c. 167, § 80, the truth of the libellous

Digitized by Google

matter may be given in evidence, and forms a complete justification, unless malice is shown. Whether the statement was true, and whether there was malice, were issues proper to be submitted to the jury. The questions first objected to relate to the purpose of the defendant in forming and carrying on the association, and we see no objection to their admission. As is said in *Weston* v. *Barnicoat*, *ubi supra*, the jury might have found that "the whole organization was a mere scheme . . . to enforce colorable claims of the members by a boycott intended to take the place of legal process, and that there was no pretence of any duty about the matter," or they might have found, as is said by the court in the same case, that "the purpose of the association and publication was and was understood to be merely to give information to members concerning the credit of people with whom they might deal."

The last question put to the defendant by his counsel was properly allowed, in the discretion of the presiding judge, as the plaintiff who called him as a witness had opened the matter of what his intention was.

The remaining exception relates to the admission of the testimony of one Dupee, the secretary of the association. He was called as a witness for the plaintiff, and identified several circulars and letters referred to in the plaintiff's declaration, as well as others relating to the process of dealing with the plaintiff through that association. The defendant was then permitted to examine him upon the practice of the association in regard to arbitration in case of differences, though no evidence had been put in on either side, that either of the parties had requested or submitted to arbitration in regard to such differences. We do not think that the last fact stated is of any importance. The defendant was on trial for starting the machinery of an association, which might be a very unjust association, or which might be a very fair one, intended not to collect debts not due, but merely honest debts. The machinery of the association was called in question, and we do not see that the plaintiff has any ground of exception to the subject matter of the inquiry.

It also seems to us that the extent of the cross-examination was within the discretion of the presiding judge. *Jones* v. *Smith*, 121 Mass. 15. *Commonwealth* v. *Nash*, 135 Mass. 541. *Barrett* v. *Murphy*, 140 Mass. 133, 143, 144. *Exceptions overruled.*

Digitized by Google

## FREDERICK A. CLAPP *vs.* AARON O. WILDER & another.

Worcester. October 4, 1898. — June 20, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Deed — Condition — Reservation — Restriction — Declarations of Grantor.*

The owner of two adjoining lots of land, lot "A," on which was a store building, and lot "B," upon which was a dwelling-house occupied by him, conveyed lot "A" by deed containing the following provision: "And this conveyance is made upon the express condition that said W. [the grantee], his heirs and assigns, shall never erect any building nearer the street line of said land than the store building now thereon." The grantor's executors sold lot "B" to his widow, whose heirs conveyed it to J., and J. conveyed it to the plaintiff in this suit. *Held*, on a bill in equity to enjoin W. from building an addition to his store on lot "A," that the clause in question was a condition, and that upon full consideration of the whole deed in the light of the attendant circumstances the plaintiff had failed to show that this condition was created for the benefit of his land. KNOWLTON, MORTON, & LATHROP, JJ., dissenting.

Declarations of a grantor as to his purpose in inserting a condition in a deed made just after the delivery thereof, are inadmissible at the trial of a bill in equity to restrain the owner from a violation of the condition.

BILL IN EQUITY, for an injunction to restrain the defendants from building an addition to their store building, in violation of a provision in a deed of land in Leominster. The case was submitted to the Superior Court on an agreed statement of facts, in substance as follows.

On March 1, 1867, Joseph M. Eaton, who was the owner of two adjoining lots of land, lot A, on which was a store building, and lot B, upon which was a dwelling-house occupied by him, conveyed lot A to Aaron O. Wilder and Thomas A. Hills by warranty deed containing the following provisions: "Also a right of way eight feet wide on my land southerly of the above described, from said street easterly 'parallel' to and the whole length of the third above described line, for all the purposes of said premises: also the right to maintain a drain from the cellar under said store building conveyed to me by, . . . reserving, however, for my said adjoining land, forever, a right of way eight feet wide, the whole length of the southerly side of the above described land, making in connection with the right of way hereby con-

Digitized by Google

veyed to said Wilder and Hills a passageway sixteen feet wide, to be used in common by the owners of the estate on either side thereof, and by Savilon E. Wilder and his heirs and assigns forever, for all the purposes the estate now owned by him; also reserving the right to maintain the drain from the cellar under the house where I now reside to the cellar under said store building. And this conveyance is made upon the express condition that said Wilder and Hills, their heirs and assigns, shall never erect any building nearer the street line of said land than the store building now thereon."

The front line of the store building on lot A was twenty-two and one half feet from the easterly line of Central Street. At the time of the conveyance to the defendants, Eaton was an invalid confined to the house. He died in 1868. While negotiations for the purchase of lot A were pending between said Eaton and the defendants, and prior to the delivery of the deed, said Eaton told them that if he sold them the property he did not wish his view of Central Street from his sitting-room window cut off, and he should have some clause inserted in the deed to prevent this, and when the deed was delivered he told the defendants he had put in a clause so that his view of Central Street from his sitting-room window should not be cut off. Soon after the delivery of the deed said Eaton told others that his purpose in preventing the defendants building nearer Central Street than the line of the old store was to save his view of the street from his sitting-room window, and that he expected the land would be built over when he was gone. The plaintiff denied the competency of these declarations of Eaton, and it is agreed that if they were incompetent and immaterial they were to be disregarded by the judge.

Eaton's executor sold lot B to his widow, who died in 1885, and her heirs conveyed said lot to Joseph W. Wilder, who in 1888 conveyed the same to the plaintiff. None of these deeds of lot B contained any mention that the condition in the deed of lot A to the defendants was imposed for the benefit of lot B, or contained any reference whatever to said condition.

The plaintiff bought lot B knowing of this condition. Since the deed of lot A to the defendants the character of the neighborhood has changed, the buildings now being mainly devoted to business purposes, and the neighborhood is now to all intents

Digitized by Google

and purposes a business or mercantile one. The old house in which Eaton resided has been torn down, and the plaintiff, believing the restriction was valid, built a store thereon. The defendants owning lot A proposed to enlarge their store by building twenty feet nearer the line of Central Street. The plaintiff forbade them to do this, and, his notice being disregarded, brought this bill.

Hearing before *Gaskill*, J., who ruled that the clause in dispute is a restriction, and found "from the terms of the deed and surrounding circumstances and situation that it was not intended by the grantor to create a servitude for the benefit of the plaintiff's land," and then by consent of counsel reported the case to this court upon the bill, answer, agreed facts, and his "findings."

The case was submitted on briefs to all the justices.

*C. A. Babbitt*, for the plaintiff.

*H. Mayo*, for the defendants.

HAMMOND, J. This case turns upon the legal force and effect of this clause in the deed from Eaton to the defendants, namely, "And this conveyance is made upon the express condition that said Wilder and Hills, their heirs and assigns, shall never erect any building nearer the street line of said land than the store building now thereon."

The first question is whether this is a common law condition. The deed is in the ordinary form of a warranty deed in general use in this Commonwealth, is carefully drawn, and it bears upon its face evidence that the draftsman understood the meaning of the legal terms used.

It conveys in apt language the land now owned by the defendants, and creates also, in express terms, two easements, one of which is a right of way over a strip of land eight feet wide on the grantor's land next southerly of and adjoining the land conveyed, and the other is the right to maintain a drain from the store building as conveyed to the grantor by a prior deed; and it reserves a right of way over a strip of land upon the southerly side of the land conveyed, making, in connection with the right of way above conveyed to the defendants, a passageway sixteen feet wide to be used in common, and also the right to maintain a certain drain from the cellar of the house where the grantor resides to the cellar under said store building.

Digitized by Google

Up to this point the grantor has used language apt to create easements and reservations. He desires to do one thing more, and that is to prevent the erection of any building within a certain distance of the street. Everything else has been provided for. Here the language changes, and, as to this one thing, the deed is upon the express condition that this provision be complied with.

The language is "upon the express condition," an emphatic form of the expression "on condition." Whatever may be the force of this language in a will (see *Attorney General* v. *Wax Chandlers' Co.* L. R. 6 H. L. 1; *Bradstreet* v. *Clark*, 21 Pick. 389), there can be no doubt of its usual meaning in a deed. The phrase *sub conditione*, or "on condition," is one of the three phrases by which, without more, a conditional estate may be created. It is the first one named by Littleton, and Coke says of it, "This is the most expresse and proper condition in deed, and therefore our author beginneth with it." Co. Lit. 203 a. *Rawson* v. *Uxbridge School District*, 7 Allen, 125, and authorities cited.

In the deed before us it applies to one single thing perfectly plain and simple. The common law as to the creation of conditional estates has always been considered a part of our common law. If we are to have such estates it is important that there should be the least possible uncertainty as to the form of the language to be used in creating them; and, when we find in a deed an intensified form of the phrase which from the earliest times has been regarded as "the most expresse and proper" phrase by which to create such an estate, it is to be assumed, in the absence of anything appearing in the deed to the contrary, that the phrase is used for its proper legal purpose, namely, to create such an estate, and that such an estate is thereby created. No doubt there is a disposition among courts to look for something in the deed which shall modify the severity of the language; and sometimes considerable astuteness has been exercised in this direction; *Post* v. *Weil*, 115 N. Y. 361; and no doubt the language is sometimes used when, from the whole deed, it sufficiently appears that it could not have been intended in its full technical sense, and in such cases a restriction and not a technical condition is the result.

Digitized by Google

Thus in *Sohier* v. *Trinity Church*, 109 Mass. 1, 19, the expression "in trust nevertheless and upon condition always" was held not to create a condition, because "the grantors were merely a committee who had taken their title in trust for the society; and if it were to come back to their heirs by forfeiture, it must be held by them in trust for the society, and thus would merely be turned into a trust estate."

In *Episcopal City Mission* v. *Appleton*, 117 Mass. 326, the words "upon and subject to the condition" preceded one paragraph, and the words "and also upon the further condition" preceded the next paragraph; and they were held not to create conditions. As stated by the court, there was no reason for giving to the first phrase any different meaning than that given to the other; and both clauses could not be construed as conditions, because "upon that construction a breach of the first would, upon entry by the grantor or his heirs, forfeit the whole estate and leave nothing in the grantee to which the last part of the second clause could apply." The second clause could "therefore have effect only by way of restriction, and the first clause must have a like interpretation and effect."

So also where a conveyance is subject to several conditions of varying importance regulating the mode in which the grantee may use and enjoy the land, and it appears that they are imposed as a part of a general scheme of improvement, and therefore enforceable in equity by the owners of the estates for whose benefit they were imposed, they may be considered restrictions, especially if one of them be of such a nature as to be regarded as a personal stipulation. *Skinner* v. *Shepard*, 130 Mass. 180. *Ayling* v. *Kramer*, 133 Mass. 12.

So also a deed reciting that the premises are conveyed subject to a condition contained in a prior deed, and reciting the condition, may be construed, not as reimposing the condition by the grantor, but as conveying the title the grantor had received from his predecessor.

Nor is the case of *Cassidy* v. *Mason*, 171 Mass. 507, to be understood as extending this doctrine further than as stated in these two paragraphs. *Ayling* v. *Kramer*, *ubi supra*. See *Locke* v. *Hale*, 165 Mass. 20.

The case at bar does not come within any exception to the

Digitized by Google

general rule as to the legal meaning of the phrase "upon the express condition." As stated by Parker, C. J., in *Gray* v. *Blanchard*, 8 Pick. 283, 287, the words, "'This conveyance is upon the condition,' can mean nothing more nor less, than their natural import. . . . It would be quite as well to say that the words mean nothing, and so ought to be rejected altogether."

It must be held, therefore, that the deed from Eaton to the defendants conveyed a conditional fee, and that the right of reverter, remaining in the grantor up to the time of his death, went to his heirs or devisees. *Hayden* v. *Stoughton*, 5 Pick. 528. *Gray* v. *Blanchard*, 8 Pick. 283. *Austin* v. *Cambridgeport Parish*, 21 Pick. 215. *Guild* v. *Richards*, 16 Gray, 322. *Allen* v. *Howe*, 105 Mass. 241. Pub. Sts. c. 127, § 1.

The next question is whether this condition was imposed for the benefit of the land now held by the plaintiff. If it was, then it is immaterial whether it be in the form of a condition or restriction so far as respects the right of this plaintiff. *Whitney* v. *Union Railway*, 11 Gray, 359. *Hopkins* v. *Smith*, 162 Mass. 444, and cases therein cited.

Upon this question the case comes to us in a singular way, and it is somewhat difficult to understand the terms of the report.

Upon the record before us there is an agreed statement of facts, and it would seem that the case was submitted to the Superior Court upon that.

The trial judge ruled that the clause in dispute is a restriction, then "found from the terms of the deed and surrounding circumstances and situation that it was not intended by the grantor to create a servitude for the benefit of the plaintiff's land," and then by consent of counsel reported the case to this court upon the bill, answer, agreed facts, and his "findings." If his so called finding is to be regarded as a finding of fact, and that finding is to stand, then there is no case for the plaintiff.

The parties, however, have treated the matter as in substance a ruling in law, and we therefore assume it was intended as such, and that the case is before us upon the bill, answer, and agreed facts.

The burden is upon the plaintiff to show that the condition in the deed to the defendants created a servitude or right in the



Digitized by Google

nature of an easement, which by implication is made appurtenant to his land.

The rule is stated in *Whitney* v. *Union Railway*, *ubi supra*, to be that when "it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed to the grantee; and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land."

But whether the condition was intended to create merely a right of reverter, or an easement appurtenant to some other land, is always a question of intent. As stated in *Beals* v. *Case*, 138 Mass. 138, 140, "It is always a question of the intention of the parties; and, in order to make this rule applicable, it must appear from the terms of the grant, or from the situation and surrounding circumstances, that it was the intention of the grantor in inserting the restriction [condition] to create a servitude or right which should enure to the benefit of the plaintiff's land, and should be annexed to it as an appurtenance."

There is no language in the deed expressly stating that this condition was inserted for the benefit of the remaining land. It would have been easy to say that it was so inserted if that had been the intention of the grantor. This omission is rendered more significant when it is observed that the right of way which is reserved in the deed is "to be used in common by the owners of the estate on either side thereof," thereby showing that when the grantor intended to make a reservation for the benefit of his remaining lot he appreciated the importance of making that intention clear, and knew how to do it.

We must, therefore, look into the situation and attendant circumstances.

It is not a case where the owner of land adopts a scheme or plan for its improvement, dividing it into house lots, and inserting in the various deeds uniform restrictions as to the purposes for which the land may be used, such restrictions upon each

Digitized by Google

being intended for the benefit of the other lots, and it is therefore not included in the class of cases of which *Whitney* v. *Union Railway*, 11 Gray, 359, and *Hopkins* v. *Smith*, 162 Mass. 444, are examples.

And the case is still further distinguishable from many of these cases by the fact that in them there is express language in the deeds showing an intention to create the easement for the benefit of other land.

And the case is unlike *Peck* v. *Conway*, 119 Mass. 546. In that case there was a reservation and not a condition, and the grantor could have no interest in the reservation other than as connected with his remaining land. In this present case the grantor retained an interest in the land sold to the defendants, and after the sale of the remaining land the right of reverter in the defendants' land still remained in their heirs or devisees.

It appears that the grantor was an invalid, and that he usually sat at a window from which he had a good view of the street, and that while negotiations were pending between him and the defendants, and prior to the delivery of the deed, he told them that if he sold the property to them he did not wish his view of the street from that window cut off, and he should have some clause inserted in the deed to prevent this, and when the deed was delivered he told the defendants he had put in a clause so that his view of the street from the window should not be cut off.

He was sick, desired to have the view from the window remain unimpaired so long as he should live where he then lived. He was looking out for his personal comfort while in occupancy of the house, but that purpose is perfectly consistent with the view that he was not making any provision for the future occupant.

It may be admitted that it would be for the benefit of the plaintiff's land to have the condition observed, but the real question is, Was it the intention of the grantor that the right to have it thus observed should be an appurtenance to that land?

On this question we may properly take into consideration the manner in which he protected himself. In the case of a restriction or reservation, the person who creates the restriction stands,

Digitized by Google

as a rule, absolutely indifferent to its observance, except as he may be interested as owner of some adjoining land. But it is otherwise in the case of a condition. The owner of the right of reverter has an interest in the land conditioned entirely independent of the benefit of other land owned by him or any other person. It is a right personal to him and his heirs or devisees. Indeed in ancient times conditions were, as a rule, of such a nature that their observance or violation was of no benefit or damage whatever to any other land than that upon which the condition was imposed, and the only persons interested were the owners of the defeasible estate on the one hand, and the owner of the right of reverter on the other. See Co. Lit. 201 a, *n*.

In this very case the owner of the right of reverter could, in any event, enter for breach of condition and hold the land free from condition, as of his original estate, as against the whole world, unless indeed an exception be made in favor of the plaintiff.

The only circumstance here relied upon as showing that the grantor intended to create this conditional estate for the benefit of his remaining land is that he was occupying it as a homestead at the time of the grant, and that it would be benefited by the observance of the condition.

But these facts are just as consistent with the idea that the grantor intended that this remaining land should have the benefit of the condition only so long as he pleased, whether occupied by him or not, and that at all times the right of reverter should remain unimpaired in him or his heirs.

Upon full consideration of this whole deed in the light of the attendant circumstances, we think that the plaintiff has failed to show that this condition was created for the benefit of the plaintiff's land.

We are aware that in other States there have been decisions that may seem to be, and perhaps are, in conflict with this decision, although we are inclined to think that, upon full examination, the difference may be more seeming than real, and that the difference of result arises rather from a difference in the facts than from any difference as to well recognized legal or equitable principles. See *Clark* v. *Martin*, 49 Penn. St. 289; *Watrous* v. *Allen*, 57 Mich. 362; *Post* v. *Weil*, 115 N. Y. 361.

Digitized by Google

But however that may be, we think a decision for the plaintiff on the facts of this case would be extending the doctrine of *Whitney* v. *Union Railway*, *ubi supra*, and of similar cases in this Commonwealth, beyond its legitimate scope, and much further than it ought to go.

The case is rather to be classed with such cases as *Badger* v. *Boardman*, 16 Gray, 559; *Jewell* v. *Lee*, 14 Allen, 145; *Sharp* v. *Ropes*, 110 Mass. 381; *Dana* v. *Wentworth*, 111 Mass. 291.

It seems to us that in all these cases it is better to get at the intention of the grantor from the language of the deed, interpreted in the light of the attending circumstances, than to conjecture the intent from the circumstances, and then to make the language of the deed bend to that.

The declarations of Eaton, made after the delivery of the deed, were properly excluded. *Bill dismissed.*

MORTON, J. There is no doubt that there are words in the clause in question express and apt to create a condition at common law, and that estates upon condition are a well known form of estate. But that does not assist us much in the construction of the clause. There never has been any hard and fast rule that words express and apt to create a condition at common law in a deed should always be so construed. From the time of Lord Coke, if not before, such words have received a different construction when required in order to promote the obvious intent and purpose of the parties. Co. Lit. 203 a. *Lord Cromwel's case*, 2 Co. 70. Shep. Touch. 122. 1 Bl. Com. (Bk. 2, Sharswood's ed.) 151, *n.* 1.

The converse has been equally true. Words not apt to create a condition in a deed at common law have been construed as creating one when such appeared to be the intention of the parties and the language admitted of such a construction. Shep. Touch. 123.

Neither does the law look with especial favor upon estates on condition. "Conditions subsequent," it is said by Chancellor Kent, "are not favored in law." 4 Kent Com. 129. They are strictly construed against parties seeking to enforce them, and equity affords relief in various cases from forfeiture for a breach of them. *Bradstreet* v. *Clark*, 21 Pick. 389. *Merrifield* v. *Cobleigh*, 4 Cush. 178. *Lilley* v. *Fifty Associates*, 101

Digitized by Google

Mass. 432. *Lundin* v. *Schoeffel*, 167 Mass. 465, 470, and cases cited.

These doctrines have been long and well settled. And they have led this court and other courts frequently to construe so called conditions not according to the strict meaning of the words used, but in such a manner as to carry out the intentions of the parties as manifested by a fair interpetation of the language when viewed in the light of the attendant circumstances. If it appeared that the parties intended to create an estate upon condition, effect has been given to the intention. If it appeared that some other right or obligation was intended to be created, the language has been construed accordingly. The matter has been regarded as one of substance rather than of form, and the cardinal rule of construction has been not to ascertain the effect in regard to estates upon condition, but to ascertain and enforce the intention of the parties so far as it could be done consistently with established rules. In numerous cases, for one reason or another, words apt to create a condition at common law in a deed have been interpreted as meaning something else, — limitations, covenants, restrictions, easements, servitudes, and trusts, — because it was thought that such a construction would best conform to and carry out the intention of the parties. *Parker* v. *Nightingale*, 6 Allen, 341. *Chapin* v. *Harris*, 8 Allen, 594. *Sohier* v. *Trinity Church*, 109 Mass. 1, 19. *Jeffries* v. *Jeffries*, 117 Mass. 184. *Episcopal City Mission* v. *Appleton*, 117 Mass. 326. *Skinner* v. *Shepard*, 130 Mass. 180. *Ayling* v. *Kramer*, 133 Mass. 12. *Hopkins* v. *Smith*, 162 Mass. 444. *Cassidy* v. *Mason*, 171 Mass. 507. *Avery* v. *New York Central & Hudson River Railroad*, 106 N. Y. 142. *Post* v. *Weil*, 115 N. Y. 361. *Clark* v. *Martin*, 49 Penn. St. 289. *Watrous* v. *Allen*, 57 Mich. 362. *Lake Erie & Western Railroad* v. *Priest*, 131 Ind. 413. *Wier* v. *Simmons*, 55 Wis. 637. *Fuller* v. *Arms*, 45 Vt. 400. *Mills* v. *Davison*, 9 Dick. 659. *Neely* v. *Hoskins*, 84 Maine, 386.

The decisions in which this has been done have not been confined to any particular class of cases, such as, for instance, building schemes and plans of general improvement, but the rule has been applied in other cases, and has been recognized in cases where it was not applied. It is an application to conditions in deeds of the rule adopted in regard to other written instruments,

Digitized by Google

namely, to so construe them as best to promote the obvious intent and purpose of the parties. *Merrifield* v. *Cobleigh*, 4 Cush. 178. It is the same principle which has led to the construction of a deed intended to take effect *in futuro*, as a covenant to stand seised, (*Trafton* v. *Hawes*, 102 Mass. 533, 541,) and is, I think, a sound and sensible rule, and one calculated to do justice between parties.

The question then is, it seems to me, how shall this clause be construed in the light of adjudged cases in this and other courts, and in the light of the attendant circumstances at the time of the execution of the deed.

The latest case in this court in which the construction of a condition in a deed has been considered is *Cassidy* v. *Mason*, 171 Mass. 507. There were three deeds, each having a clause that contained language apt to create a condition at common law. In the first deed the language was "Provided that no building shall ever be erected on said lots of land or either of them within ten feet of the streets as exhibited on said plan." In the second it was, "On condition that no building shall ever be erected on said lot within ten feet of said plan [*sic*] as laid down on said plan." And in the third it was, "The premises are sold subject to the condition that no building shall ever be erected on the granted premises within less than ten feet from said street." It will be seen that the object of each provision was the same as here, namely, to prevent the erection of buildings within a certain distance of the street, and that words, the most apt to create a condition at common law, were used, namely, "provided," "on condition," and "subject to the condition." There is nothing in the case as reported or in the papers on file that shows that the provisions were inserted as part of a general scheme or plan of improvement, and the opinion does not purport to go on that ground. All of the justices sitting concurred, so far as appears, in the opinion, which was written by the late Chief Justice. It was held that the provisions should be continued as restrictions and not as conditions. It is not really attempted, as I understand it, to distinguish that case from this. It would seem that the remark of Lord Ellenborough in *Liverpool Waterworks Co.* v. *Atkinson*, 6 East, 507, was applicable: "With a decided case exactly in point, it would be extraordinary if we were

Digitized by Google

to apply a different rule of construction." Moreover, it is not easy to see how the manner in which that case is dealt with tends to promote certainty in the law regarding conditions in deeds. In *Hopkins* v. *Smith*, 162 Mass. 444, the provision that was the subject of consideration was expressed in the form of a condition with what was in effect a clause of forfeiture and reverter, but the court held that it constituted a restriction for the benefit of the purchasers of other lots. This case, with *Cassidy* v. *Mason*, *ubi supra*, illustrates the tendency of this court and shows the extent to which it has gone in recent decisions in the construction of so called conditions. In *Ayling* v. *Kramer*, 133 Mass. 12, a condition that "the front line of the building which may be erected on the said lot shall be placed on a line parallel with and ten feet back from the said Newton Street," was held to constitute a restriction. The decision was put on the ground that the condition was imposed as a part of a general scheme of improvement. But conditions are construed as restrictions in such cases, not because courts have any special fondness for or leaning towards building schemes or plans of general improvement, but because it would be inequitable and unjust as against the owners of adjoining and neighboring estates to construe them otherwise, and to permit a party taking an estate with notice of a valid agreement respecting its mode of use and occupation towards such estates to avoid it. *Whitney* v. *Union Railway*, 11 Gray, 359. *Parker* v. *Nightingale*, 6 Allen, 341. It is difficult to see why such reasoning does not apply as well between two as between twenty, or why, if it is inequitable and unjust to permit a party to avoid his agreement when there are ten estates to be affected, it is not also inequitable and unjust when there is only one estate to be affected. See also *Jeffries* v. *Jeffries*, 117 Mass. 184, in which the clause, "provided that the roof of the aforesaid stable shall never be raised more than thirteen feet above Olive Street," in each of three deeds of three adjacent lots from a common grantor, was held to constitute a restriction on each lot in favor of the other two. In *Episcopal City Mission* v. *Appleton*, 117 Mass. 326, and *Skinner* v. *Shepard*, 130 Mass. 180, there was no building scheme or plan of general improvement. The respective deeds contained building limitations in the form of conditions. They were construed as restric-

Digitized by Google

tions, for reasons there given. See also *Parker* v. *Nightingale* and *Merrifield* v. *Cobleigh*, *ubi supra*.

In *Post* v. *Weil*, 115 N. Y. 361, the owners of two adjoining farms conveyed one subject to this provision: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, . . . be at any time hereafter used or occupied as a tavern or public house of any kind." It was held that the provision constituted a restriction for the benefit of the adjoining property. See also *Avery* v. *New York Central & Hudson River Railroad*, 106 N. Y. 142. In *Clark* v. *Martin*, 49 Penn. St. 289, the owner of two adjoining lots, who resided on one, conveyed the other "upon this express condition, nevertheless, that the said . . . their heirs or assigns, shall not build or erect, . . . on any part of the hereby granted lot of ground, beyond the distance of sixty-five feet from the said Eighth Street, any buildings whatsoever, other than privies, milk or bathing-houses, and walls or fences not exceeding the height of ten feet from the level of the ground." It was held that it was the duty of the defendant not to build in violation of the condition, and that this duty was reserved to the original grantor, not as a mere personal obligation, but for the benefit of the adjoining land, Lowrie, C. J., who wrote the opinion, saying, "Common sense cannot doubt its purpose"; meaning the purpose of the condition, and that it was to benefit the adjoining land. In *Watrous* v. *Allen*, 57 Mich. 362, the deed was upon "the express condition" that if the grantees, their heirs and assigns, should at any time sell or keep for sale spirituous or intoxicating liquors, the title of the premises should thereupon cease and revert to the grantor, his heirs and assigns, and it should be lawful for them to enter and expel the grantees and their heirs and assigns. It appeared that the grantor was the owner of a large amount of real estate in the vicinity of and contiguous to the granted premises, and that the same had been plotted; but it did not appear that any of the other lots had been sold, or that, if sales had been made, the deeds contained provisions uniform with that above referred to. It was held that the condition could be enforced in equity as an agreement by one who had succeeded to the title of the original grantor to the adjoining and neighboring land against one who had succeeded to

Digitized by Google

the title of the original grantee. See also *Fuller* v. *Arms*, 45 Vt. 400; *Lake Erie & Western Railroad* v. *Priest*, 131 Ind. 413; *Wier* v. *Simmons*, 55 Wis. 637.

It seems to me that the case of *Cassidy* v. *Mason*, *ubi supra*, and the other cases to which I have referred, are decisive of this. In the present case, at the time of the conveyance to the defendants, their grantor owned and occupied as a homestead the premises now belonging to the plaintiff, and adjoining on the north those of the defendants. The premises were both situated on the easterly side of Central Street in Leominster. On the premises conveyed to the defendants the only building, so far as appears, was a store two stories high and twenty-two and one half feet from the street line. On those retained by the defendants' grantor was the dwelling-house occupied by him. This was considerably nearer the street than the store, and was, as appears from the scale to which the plan is drawn, about thirty-five feet south of the store. It appears that there was a good view of Central Street which was the main street of Leominster from the homestead occupied by the defendants' grantor over the space between the store and the street. The defendants have built out to the street line, although they were notified by the plaintiff not to do so, and though their deed prohibits them from doing so.

It is stated in the majority opinion that the declarations of the defendants' grantor made after the delivery of the deed were properly excluded, and they clearly were. I think that it is equally clear that his declarations made before and at the time of the delivery of the deed were also properly excluded. They were declarations by him respecting his purpose in having the clause inserted, and as such were, it seems to me, clearly inadmissible. I therefore lay them one side. *Harlow* v. *Thomas*, 15 Pick. 66. *Noble* v. *Bosworth*, 19 Pick. 314. *Davis* v. *Ball*, 6 Cush. 505. *Miller* v. *Washburn*, 117 Mass. 371. *Simanovich* v. *Wood*, 145 Mass. 180. *Adams* v. *Morgan*, 150 Mass. 143. *Lilienthal* v. *Suffolk Brewing Co.* 154 Mass. 185. *Sirk* v. *Ela*, 163 Mass. 394.

It is plain that the object of the so called condition was to prevent the defendants from doing what they have done, and to prevent them from doing it at any time either during the grantor's

Digitized by Google

life or afterwards. The language is "that said Wilder and Hills, their heirs and assigns, shall never erect any building nearer the street line," etc. The prohibition expressly extends not only to Wilder and Hills, but to their heirs and assigns, — to all who shall take through them. When Wilder and Hills took their deed, they thereby agreed for themselves and their heirs and assigns that they would never build any nearer the street line than the store then was. The right and obligation thus created were not limited to the lives of the grantor and grantees, and were not temporary in character, but were to continue indefinitely, and were permanent. Which, then, is the more reasonable, that they were created for the benefit of the adjoining estate, or for the personal benefit of the grantor? It is possible, perhaps, to think of the grantor as speculating upon possibilities of reverter and rights of re-entry, and as pausing to consider the differences between reservations and conditions; but it is not likely that he did so. It must have been plain to him, as it must, it seems to me, to every one else, that no one could have as much interest in having the space between the store and the street kept open as the owner and occupant of the adjoining premises, and that his interest would consist in the fact that he was such owner and occupant. This would apply to the grantor as well as to his successors in title. The grantor was not thinking of a personal right or privilege. He was dealing with property and rights of property, not with personal rights. That is shown by what was conveyed, and by the reservations of the rights of way and drainage. It is fair to assume that the scrivener who drew the deed knew that rights could be created for the benefit of an adjoining estate as well in the form of a condition as in the form of a reservation or restriction. To assume otherwise would be to suppose that he was ignorant of numerous cases in which this court has so held, and of long established rules. The change from the language of reservation to that of condition was not for the purpose of altering the nature of the right, but to express in the strongest terms that the estate which he was conveying should remain subject forever to an easement of light, air, and prospect in favor of the other estate. He does this by making the conveyance upon the express condition that the grantees, their heirs and assigns, should never build nearer the

Digitized by Google

street line than the store then was. The reasoning of the court in *Peck* v. *Conway*, 119 Mass. 546, where the grantor occupied as a homestead a lot adjoining that which he conveyed, seems to me applicable. "It is difficult," says the court, "to see how he [the grantor] would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect; this is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate." It is true that in that case the right was created by reservation. But no stress was laid on that fact, and personal rights may be created as well by reservations or restrictions as by conditions. The question was whether the right was a personal right or was appurtenant to the adjoining land, and the court was led, from the situation and manner of occupation of the two estates, to hold that the right was not a personal right but constituted an easement in favor of the adjoining estate.

It is to be noted, also, that there are no words of re-entry, reverter, or forfeiture in the clause which we are considering. Such words are not necessary to constitute an estate upon condition. But if the grantor had intended to create a personal right in himself and his heirs and devisees in distinction from the rights of way and drainage created by reservation, it is not improbable, to say the least, that he would have added words so characteristic of estates upon condition.

The cases of *Badger* v. *Boardman*, 16 Gray, 559, *Jewell* v. *Lee*, 14 Allen, 145, *Sharp* v. *Ropes*, 110 Mass. 381, and *Dana* v. *Wentworth*, 111 Mass. 291, are clearly distinguishable from this. This is a case as in *Peck* v. *Conway* and *Clark* v. *Martin*, *ubi supra*, of a grantor owning and occupying a homestead, and owning and conveying an adjoining lot subject to a building limitation. Naturally the limitation would be intended for the benefit of the homestead. In *Peck* v. *Conway*, the adjoining lot was vacant. In *Clark* v. *Martin*, there was a house upon it. In the present

Digitized by Google

case there was a store upon it which stood farther back from the street than the homestead occupied by the grantor, thereby giving the homestead increased light, air, and prospect, which it was the manifest object of the condition to retain. In neither *Badger* v. *Boardman*, *Jewell* v. *Lee*, *Sharp* v. *Ropes*, nor *Dana* v. *Wentworth* were the circumstances surrounding the parties when their deeds were made at all similar to those surrounding the parties when the deed in this case was made.

I think, therefore, that whether the provision is called a condition or a restriction, the plaintiff as owner of the adjoining premises is entitled to the benefit of the agreement contained in it, and that a decree should be entered in his favor.

Mr. Justice KNOWLTON and Mr. Justice LATHROP concur in this dissent.

---

HENRY C. SHERMAN, executor, *vs.* CONGREGATIONAL HOME MISSIONARY SOCIETY & others.

Hampden. November 13, 1899. — June 20, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Valid Public Charity — Agreed Facts — Legacies not Void if General Charitable Intent appears.*

A testator gave devises by will to "a Rest Home for worthy working girls" and to an "Old Ladies' Home." The agreed facts recited that in neither are the advantages of the institution furnished to the inmates for profit, and in neither is there any provision made for making dividends or profits; that when incorporated they have no capital stock; that their funds are derived from voluntary contributions from benevolent persons, supplemented by such sums as may be received from the inmates, and whatever funds are received are devoted to the purposes of the institution; that a "Rest Home" is a place of rest for girls who are working for small wages, where they may go and board in the country at a low price; that some are endowed, some are under the general management of charitable organizations, and some are managed by trustees; that they are not usually incorporated; that the object of an "Old Ladies' Home" is to provide a home for aged, homeless, and indigent women; that inmates are received and provided with a home during life, including clothing, sometimes without any payment, and sometimes upon the payment of a small fee fixed by the by-laws; that the control is usually vested in managers who serve gratuitously, and that old ladies' homes are usually incorporated. *Held*, that the institutions constituted valid public charities, and that the clause in the will making the devises

Digitized by Google

"the plan to be hereafter devised or left in care of said executor," manifested a general charitable intent, leaving undetermined the particular manner in which it should be carried into effect.

The reference in certain clauses of this will to a "Rest Home" is to a valid public charity created by a previous clause in the will, and the gift is valid in each case.

In case of a gift for charitable uses, the general charitable intent being clear, the court will carry it into effect notwithstanding there may be uncertainty in regard to the particular persons or objects intended to be benefited by the testator's bounty; and in this case the gift "to W. C. T. U. or Rest Home in Chicopee Street, Mass.," being to the Massachusetts Woman's Christian Temperance Union, and a Rest Home in Chicopee for worthy working girls, both valid public charities, the legacy is to be divided equally between them.

PETITION to the Probate Court, by the executor of the will of Sarah J. Sherman, as to instructions as to the construction thereof. That court entered a decree, and an appeal was taken to this court, and the case was reported for the consideration of the full court, by *Barker*, J., on an agreed statement of facts, the nature of which appears in the opinion.

Instructions were asked as to the meaning of the following five clauses of the will:

"2. I hereby give and bequeath my real estate, consisting of house, barn, and land, situated in Chicopee Street, as a Rest Home for worthy working girls, or Old Ladies' Home, the plan to be hereafter devised or left in care of said executor.

"3. I hereby give and bequeath to my brother, Henry C. Sherman, of Sterling, Colorado, the sum of three thousand dollars ($3,000); at his decease one third of this sum shall go to the W. C. T. U. organizations in Colorado, one third to W. C. T. U. organizations in Mass., one third to endow the Rest Home in Mass. . . .

"5. To my aunt, Mrs. Roxy B. Ferry, of Brimfield, Mass., if living, the use of one thousand dollars ($1,000); at her decease it may go the Rest Home, Chicopee Street, Mass. . . .

"20. To W. C. T. U., or Rest Home, in Chicopee Street, Mass., I give the sum of one thousand dollars ($1,000). . . .

"23. After paying the above bequests, if there be a residue, it may be divided equally among the following societies: A. H. U. [M.] S., W. C. T. U., and Rest Home." By A. H. M. S. was meant the American Home Missionary Society.

*T. Weston & T. Weston, Jr.*, for the Congregational Home Missionary Society, successor to the American Home Missionary Society.

Digitized by Google

*R. C. Cooley*, for the Massachusetts Woman's Christian Temperance Union.

*F. T. Hammond*, Assistant Attorney General, for the Commonwealth.

MORTON, J. We think that a "Rest Home for worthy working girls," and an "Old Ladies' Home," as described in the agreed facts, constitute valid public charities. In neither are the advantages of the institution furnished to the inmates for profit, and in neither is there any provision made for making dividends or profits. When incorporated they have no capital stock. Their funds are derived from voluntary contributions from benevolent persons, supplemented by such sums as may be received from the inmates, and whatever funds are received are devoted to the purposes of the institution. A "Rest Home" is a place of rest for girls who are working for small wages, where they may go and board in the country at a low price. "Some are endowed, some are under the general management of charitable organizations, and some are managed by trustees." They are not usually incorporated. The object of an "Old Ladies' Home" is to provide a home for aged homeless and indigent women. "Inmates are received and provided with a home during life, including clothing, sometimes without any payment, and sometimes upon the payment of a small fee fixed by the by-laws." The care and control are usually vested in managers who serve gratuitously. Old Ladies' Homes are usually incorporated. It is obvious, we think, that institutions such as those described above constitute valid public charities. *Jackson* v. *Phillips*, 14 Allen, 539. *Gooch* v. *Association for Relief of Aged Indigent Females*, 109 Mass. 558. *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432.

In the next place, we think that it is also plain that the second clause in the will manifests a general charitable intent, leaving undetermined the particular manner in which it should be carried into effect. In this respect this case differs from *Teele* v. *Bishop of Derry*, 168 Mass. 341.

The charitable intent is manifested by the nature and objects of the institution to whose use the property is to be devoted, and the general intent is shown in the same manner. The gift is for a "Rest Home for worthy working girls," or for an "Old Ladies'

Digitized by Google

Home," both of which, as we have already observed, are valid public charities; whether the institution as finally established should be of one kind or the other, or should combine the features of both, the testatrix had not determined at the date of the execution of the will, but the general charitable intent was clear. The precise mode in which it should be carried out was left to be determined by her thereafter, or, as we think, according to the fair interpretation of the clause by her executor in case she did not decide upon it. So construed, we think that the bequest was clearly valid. *Fairbanks* v. *Lamson*, 99 Mass. 533. *Attorney General* v. *Fletcher*, 5 L. J. Ch. 75. See also *Minot* v. *Baker*, 147 Mass. 348. Even if, as the appellants contend, the clause should be construed as meaning that a plan was to be left by the testatrix with her executor and was not, the failure to do so would not, we think, override the general charitable intent, and render the clause null. *Mills* v. *Farmer*, 1 Mer. 55. *Attorney General* v. *Syderfin*, 2 Vern. 226, *n.* *Mills* v. *Farmer*, 19 Ves. 483. *Gillan* v. *Gillan*, 1 L. R. (Ir.) 114.

We do not think, for reasons given above, that this case comes within the class of cases where, it being impossible or impracticable to carry out the testator's wishes in the manner in which he has directed, it has been held that the legacy failed. In such cases it is the mode which is of the substance of the legacy. Here the general charitable intent is of the substance of the legacy.

There can be no reasonable doubt, we think, that the testatrix intended to designate as legatee the public charity established by the second clause, when, in the third, fifth, and twenty-third clauses, she gives legacies to what she variously describes as the "Rest Home in Mass.," the "Rest Home, Chicopee, Mass.," and the "Rest Home." And we think that, for reasons already given, the gift is valid in each case.

We also think that the same public charity is meant by the "Rest Home in Chicopee Street, Mass.," in the twentieth clause. But another question arises in respect to that clause. By it the testatrix gives "To W. C. T. U. or Rest Home in Chicopee Street, Mass.," $1,000. It is agreed that the initials "W. C. T. U." were used to designate the Massachusetts Woman's Christian Temperance Union. Upon the ordinary principles

Digitized by Google

which apply to testamentary dispositions this gift would be void for uncertainty. Jarm. Wills, (6th ed.) 342 *et seq.* 1 Redf. Wills, (1st ed.) 686, 687.

But different rules apply to gifts for charitable uses. In such cases, the general charitable intent being clear, the court will carry it into effect notwithstanding there may be uncertainty in regard to the particular persons or objects intended to be benefited by the testator's bounty. Jarm. Wills, (6th ed.) 205, 346, 347. Thus where there was a bequest to the Kent County Hospital, but there was no institution of that name, the court caused it to be divided equally between two institutions which answered in other respects to the description. *In re Alchin's trusts*, L. R. 14 Eq. 230. So also when a testator had manifested a purpose to devote a certain sum to charitable uses, and had disposed of a part and had left unfilled blanks in respect to the disposition of the rest, the court referred the case to a master to report a scheme for the disposition of that portion to which the unfilled blanks related. *Pieschel* v. *Paris*, 2 S. & S. 384. See also cases referred to in Jarm. Wills, (6th ed.) 175, 176.

We infer that the purposes for which the Woman's Christian Temperance Union is established are charitable. If so, then the intent that the fund should be devised to charitable uses is clear, and we think that it should be divided equally between the charity created under the second clause and the Woman's Christian Temperance Union.

The matter of the allowances to counsel is not properly before us, and we express no opinion in regard to it.

The result is that the decree of the Probate Court is affirmed except as to the twentieth clause of the will, and as to that it is to be modified so that the fund shall be divided equally between the two beneficiaries therein named, and except as to the matter of counsel fees, which will stand for hearing before a single justice.

*Decree accordingly.*



Digitized by Google

## NATHANIEL W. JONES *vs.* PACIFIC MILLS.

Suffolk. November 22, 1899. — June 20, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Personal Injuries — Fall from Spliced Ladder — Negligence — Knowledge and Appreciation of Risk — Questions for Jury.*

Upon the evidence in this case, which was an action for personal injuries occasioned to the plaintiff while in the defendant's employ by a fall from a spliced ladder, caused by its breaking while he was standing thereon, the questions whether the accident was attributable to the use of the ladder as it was intended to be used, whether the defendant was negligent, and whether the plaintiff knew and appreciated the risk arising from the manner in which the ladder had been spliced, were questions of fact for the jury.

TORT, for personal injuries occasioned to the plaintiff, who was fifty-eight years of age, on March 8, 1897, while in the defendant's employ. The declaration was at common law. The plaintiff was employed to run a freight elevator in the "weaving mill" of the defendant, and as a part of his regular work was required to oil once a week the pulleys and the shafting which operated the elevator. As these were attached to the ceiling, about twelve feet above the surface of the third or upper floor of the mill, the plaintiff, to reach them, used a ladder which had been spliced.

At the trial in the Superior Court, before *Sherman*, J., the defendant requested the judge to rule as follows:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. Upon the evidence in this case you will find that the plaintiff, at the time he sustained the injuries alleged, was not in the exercise of due and reasonable care, and is not entitled to recover.

"3. There is no evidence of any negligence on the part of the defendant company, and the plaintiff is not entitled to recover. . . .

"6. If you find that the ladder which broke on the occasion in question was a ladder which had been in use by the plaintiff for the purpose of oiling the pulleys for a period of several

Digitized by Google

months prior to the accident, and that said ladder during said period of use had been in the same condition that it was in at the time of the accident, you will find that the plaintiff assumed all risk arising from the use of said ladder, and is not entitled to recover in this action.

"7. There is no evidence in this case that the breaking of the ladder was the direct and proximate cause of the plaintiff's falling and sustaining the injuries claimed, and the plaintiff is not entitled to recover.

"8. The breaking of the ladder is not, of itself, evidence of negligence on the part of the defendant company, and the plaintiff is not entitled to recover."

The judge declined so to rule, and the defendant excepted.

The judge submitted the case to the jury upon the issue of whether or not the plaintiff knew and appreciated the danger of using this ladder, which appeared to have been made, spliced, and repaired by the defendant, and ruled that, if he did, he could not recover, and the judge gave instructions concerning the due care of, and assumption of risk by, the plaintiff, and negligence of the defendant, and gave other instructions not objected to, and also instructed the jury that if the plaintiff did not use the ladder as he was instructed to use it, and that caused or contributed to the injury, he could not recover.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*R. M. Saltonstall*, (*E. J. Holmes* with him,) for the defendant.

*W. H. Baker*, (*E. Lowe* with him,) for the plaintiff.

HAMMOND, J. At the argument before us the exception that the evidence showed that the plaintiff was not in the exercise of due care was waived.

1. As to the negligence of the defendant. Under the instructions the jury must have found upon the evidence that the ladder broke while the plaintiff was using it in the manner in which he was expected to use it, and for the purpose for which it was intended to be used, and that it was defective.

It was incumbent upon the defendant to use reasonable care to provide a safe ladder for the plaintiff, and to keep it safe; and it is contended by the plaintiff that, in the absence of any satisfactory explanation, the fact that the ladder is not safe for the

Digitized by Google

use for which it is intended may be of itself some evidence that such care had not been used, and consequently that there was negligence on the part of those answerable for such care. *Graham* v. *Badger*, 164 Mass. 42, and cases cited.

Without, however, passing upon this contention, we are of opinion that there was other evidence bearing upon the question of the defendant's negligence. The broken ladder was shown to the jury at the trial, and they had full opportunity to see exactly the manner in which it had been spliced, and the effect upon its strength. Moreover, the experts for the plaintiff testified that the side of a ladder thus spliced was only one half to three fourths as strong as the side not spliced "when the splice was new, and that it grew weaker by use as time went on." Nor does it appear that any care was taken, after the ladder was spliced, to see what its condition was.

Upon this state of the evidence we cannot say as matter of law that the jury were not warranted in finding that the defendant was negligent.

2. The defendant contends that the plaintiff was a man of mature years and ample experience in using ladders; that he knew this ladder had been spliced, and, since the danger was obvious, he voluntarily assumed the risk of using it in the condition in which it then was.

The plaintiff may fairly be held to have assumed such risks as were obvious, or such as he knew and appreciated.

The plaintiff knew that this ladder had been spliced, and that three bolts from two to three inches apart had been used to fasten the parts together, but the ends of the bolts were covered by nuts so that he could not see how large the bolts were and exactly how much of the wood there was left, although he must have known that there was not so much wood as before.

The experts for the plaintiff testified as hereinbefore stated concerning the strength of the side which was spliced, and one testified that "the spliced side would not be more than one half to three quarters as strong as the other after it had been used six months."

The carpenters and master builders called as experts for the defendant testified that ladders spliced as was this were, in their judgment, as strong as a ladder not spliced.

Digitized by Google

In this state of the evidence we do not see how it can be held as matter of law that the danger of using this spliced ladder was so obvious that the plaintiff must be held to have assumed the risk, or that he must be held to have known and appreciated the danger arising from using such a ladder. *Packer* v. *Thomson-Houston Electric Co.* 175 Mass. 496.

We think that upon the evidence the questions whether the accident was attributable to the use of the ladder as it was intended to be used, whether the defendant was negligent, and whether the plaintiff knew and appreciated the risk arising from the manner in which this ladder had been spliced, were questions of fact for the jury. *Exceptions overruled.*

---

HENRY S. ANGUS & another *vs.* JOHN T. SCULLY.

Middlesex. November 23, 1899. — June 20, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Special Contract to do Work on Building — Implied Condition as to Building continuing to exist — Action — Quantum Meruit.*

Where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, he may recover for what he has done, one of the implied conditions of the contract being that the building should continue to exist.

CONTRACT, on an account annexed for moving buildings in Cambridge. The answer set up, among other things, non-performance due to the destruction of the building by fire, by reason of the negligence of the plaintiffs. At the trial in the Superior Court before *Stevens*, J., the jury returned a verdict for the plaintiffs; and the defendant alleged exceptions, which appear in the opinion.

*J. H. Hurley*, for the defendant.

*E. B. Hale*, for the plaintiffs.

HAMMOND, J. The contract was that the plaintiffs should move a large building belonging to the defendant from a lot on Third Street to a lot on First Street, and also to change the

Digitized by Google

location of two other buildings, of which one was on the First Street lot and one on the Third Street lot, and the defendant was to pay them $840.

In accordance with the agreement the plaintiffs began the work. "They first moved the house on the Third Street lot, and then began to move the large building from the Third Street lot across certain open lots toward the lot on First Street. When said last named building had been moved about half the distance to said lot on First Street, it was entirely consumed by fire at some time during the night, and thereupon, with the assent of the defendant, no further work was done in moving either of the other buildings."

In this action the plaintiffs seek to recover the fair value of the services rendered by them in the work done down to the time of the fire.

The court refused to rule as requested by the defendant that the plaintiffs could not recover, and submitted the case to the jury upon instructions which would authorize them to find for the plaintiffs, if they were satisfied that the fire was not attributable to any negligence of the plaintiffs.

We see no error in the rulings under which the case thus went to the jury.

Clearly one of the implied conditions of the contract was that the building should continue to exist. Upon the destruction of the building the work could not be completed according to the contract. Authorities differ as to the rights of the parties in such a case, but so far as respects this Commonwealth the rule is well settled. As stated by Knowlton, J., in *Butterfield* v. *Byron*, 153 Mass. 517, 523, "The principle seems to be, that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable."

Stated more narrowly and with particular reference to the cir-

Digitized by Google

cumstances of this case, the rule may be said to be that where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, then he may recover for what he has done.

This case comes clearly within this rule. *Lord* v. *Wheeler*, 1 Gray, 282. *Butterfield* v. *Byron*, *ubi supra*, and cases therein cited. *Exceptions overruled.*

---

CHARLES J. SIMPSON & another *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. December 5, 1899. — June 20, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

*Private Way across Railroad — Deed — Prescription — Exception — Reservation — Statute.*

A clause in a deed to a railroad corporation, "Reserving, however, a crossing or right of way to be maintained and kept in repair at the expense of said railroad corporation, and to be thirty feet wide and to cross said road or track on a line parallel with the southeasterly line of said Simpson's land and to be distant one hundred feet southwesterly therefrom," does not operate by way of exception, but only by way of reservation, and, in the absence of the word "heirs," does not operate beyond the life of the grantor.

The St. of 1892, c. 275, is intended to prevent the acquisition of rights of way across railroads by prescription, whether the adverse use had been begun prior to the passage of the statute or not, and the "existing right of way" means a right which at the time of the statute had fully ripened into a right by prescription or otherwise.

BILL IN EQUITY, to restrain the defendant from maintaining a fence on each side of its railroad across an alleged right of way, and to compel it to replace the planks removed by it from said way.

The bill alleged that the Boston and Lowell Railroad took a strip of land for railroad purposes across the farm of Jesse Simpson, in Somerville, dividing it into two parts, with several acres in each part, and filed its location to complete its taking on

Digitized by Google

September 3, 1870, and that the corporation gave Simpson $11,350, and took a deed of conveyance of the strip of land, in which appeared the following clause:

"Intending hereby to convey the land of mine taken by said railroad corporation for the purposes of its road or track, as shown by the certificate of its location filed with the records of the county commissioners for the county of Middlesex, Sept. 3, 1870. Reserving, however, a crossing or right of way to be maintained and kept in repair at the expense of said railroad corporation, and to be thirty feet wide and to cross said road or track on a line parallel with the southeasterly line of said Simpson's land and to be distant one hundred feet southwesterly therefrom. The partition fences between the land of said railroad corporation and the land of said Simpson, his heirs and assigns, to be built and kept in repair at the expense of said corporation, its successors and assigns."

For many years previous to the location of the road, Simpson had used a way across his farm and across the land covered by the railroad location, which connected his farm with North Avenue, leading to Boston, and also connected the different parts of the farm, and continued the use of said way after the said location until the railroad was graded. The grading of the railroad left high banks, making it impracticable to continue the way where it had been; but Simpson continued to cross the land covered by the location, but at no particularly defined point until the giving of the deed on October 3, 1872, when it was defined as stated therein. The way was used during the life of Simpson, who died in September, 1877, and after his death was continued in use by his heirs and successors in title until the autumn of 1898, when the defendant road, the lessee of the Boston and Lowell Railroad, closed it.

The plaintiffs were owners of portions of the farm, the first of the piece upon the northerly side, and the other, John F. Foster, of the piece upon the southerly side of the railroad. The first named plaintiff inherited his land from Jesse Simpson, and Foster obtained his from Jesse Simpson through several mesne conveyances.

The defendant demurred to the bill, assigning as grounds therefor (1) that the plaintiffs acquired no right to cross

Digitized by Google

the location of the defendant by prescription, because no right of way over a railroad location can be so acquired since the passage of St. 1892, c. 275, entitled "An Act to prevent the acquisition of rights of way across railroads by prescription"; and (2) that the right of way was originally acquired by reservation contained in the deed to the defendant, and as the reservation contained no words of inheritance, the right of way could continue only until the death of the grantor in 1877.

Hearing before *Lathrop*, J., who, at the request of the parties, reserved the case upon the bill and demurrer for the consideration of the full court. If the demurrer was sustained, a final decree was to be entered dismissing the bill; if the demurrer was overruled, a decree was to be entered for the plaintiffs according to the terms of the prayer contained in said bill.

*W. H. Brown*, for the plaintiffs.

*E. J. Rich*, for the defendant.

HAMMOND, J. As respects the record title, the rights of the parties depend upon the legal meaning of the following clause in the deed of Simpson to the Boston and Lowell Railroad Corporation: "Reserving, however, a crossing or right of way to be maintained and kept in repair at the expense of said railroad corporation, and to be thirty feet wide and to cross said road or track on a line parallel with the southeasterly line of said Simpson's land, and to be distant one hundred feet southwesterly therefrom."

If we assume in behalf of the plaintiffs that this right of way thus created was appurtenant to the land now owned by them, we are met by the question as to the duration of the easement. Was it to continue beyond the life of the grantor? Whatever may be the law elsewhere, it is settled in this Commonwealth that an easement may be created by way of exception or reservation, and, as an exception may be created by words of reservation, little reliance can be placed upon the language used. *Claflin* v. *Boston & Albany Railroad*, 157 Mass. 489, 493, and cases cited.

The clause in the deed could not operate by way of an exception, because it was a new right of way. *Ashcroft* v. *Eastern Railroad*, 126 Mass. 196. *Claflin* v. *Boston & Albany Railroad*, *ubi supra*. *Hamlin* v. *New York & New England Railroad*, 160 Mass. 459.

Digitized by Google

Nor could it operate as a reservation beyond the life of the grantor because of the absence of the word "heirs."

The principles applicable to the case have been so fully explained in comparatively recent decisions of this court that it is unnecessary further to discuss them. See, in addition to the foregoing cases, *Bean* v. *French*, 140 Mass. 229; *Wood* v. *Boyd*, 145 Mass. 176; *White* v. *New York & New England Railroad*, 156 Mass. 181.

The easement created by the deed continued only during the life of the grantor.

As to the claim of a right of way by prescription, the plaintiffs are met by St. 1892, c. 275, which reads thus: "No right of way across any railroad track or location which is in use for railroad purposes shall hereafter be acquired by prescription; but nothing herein contained shall affect any existing right of way."

The plaintiffs contend that this statute is not applicable here, because they were exercising the right of way under a claim of right, and that such a right is an "existing right of way," even if it is founded upon adverse use for a time less than twenty years. But with this interpretation of the statute we cannot agree. The statute was intended to prevent the acquisition of a right by prescription whether the adverse use had been begun prior to the passage of the statute or not, and the "existing right of way" means a right which at the time of the statute had fully ripened into a right by prescription or otherwise.

*Demurrer sustained, and bill dismissed.*

Digitized by Google

## LEMUEL E. DEMELMAN *vs.* GEORGE D. BURTON.

Suffolk. December 7, 1899. — June 20, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

*Reading Interrogatories — "Subject-matter inquired of" — Commenting upon Pleadings to the Jury.*

If one of the issues in an action is the genuineness of a signature, and that is the only "subject matter inquired of" under Pub. Sts. c. 167, § 77, by the first ten interrogatories, and there is no other interrogatory or answer upon that subject matter, the action of the court in refusing to order the counsel to read the answers to additional interrogatories, he having declined to read them unless ordered by the court, is correct.

While it is legitimate for the counsel for the plaintiff to argue that the defendant had deceived his own counsel as to the facts, and in support thereof to contrast the opening argument of the counsel for the defendant and the testimony of the defendant and another witness as to such facts on the one hand with the closing argument of the same counsel on the other hand, he has no right under Pub. Sts. c. 167, § 75, to comment upon the amended answer or the allegations contained therein, nor upon the fact that it was filed after the trial was begun, nor upon the time of its filing as having any bearing whatever upon the argument he is making; nor is it material that the counsel for the plaintiff is stating only what has taken place in the presence of the jury; nor does the fact that the amended answer was filed in their presence warrant them in considering it unless otherwise they would be so warranted.

CONTRACT, upon a promissory note. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*G. W. Anderson*, for the defendant.

*E. R. Thayer*, for the plaintiff.

HAMMOND, J. The declaration was upon a note alleged to have been made by the defendant payable to his own order and by him indorsed to the plaintiff.

The answer contained several independent defences, one of which was a denial of the genuineness of the "signature of said note," and another was that "there was no lawful consideration for the same."

Interrogatories were filed by the plaintiff to the defendant. Of these the first ten related to the issue as to the genuineness

Digitized by Google

of the signature, the eleventh to the writing of other parts of the note, and the twelfth to the delivery of the note, while the remaining eight interrogatories related to the consideration.

The defendant answered the first twelve, but declined to answer the others unless so ordered by the court. Subsequently he answered them. At the trial the plaintiff read the first ten interrogatories and the answers thereto. The defendant moved that the remaining interrogatories and answers be read. The plaintiff stated that he was willing to read any of the answers to the first twelve, and read the eleventh, but he declined to read the answers to the last eight interrogatories unless so ordered by the court. The court refused to order that these be read. To this refusal the defendant excepted.

We think that this action of the court was correct. The practice act originally provided that "the party interrogated shall be entitled to require that the whole of the answers shall be read if any part of them shall be read." This was changed in the following year by St. 1852, c. 312, § 73, so as to read as it now stands in Pub. Sts. c. 167, § 77, "the party interrogated may require that the whole of the answers upon any one subject matter inquired of shall be read, if a part of them is read." One of the issues was the genuineness of the signatures, and that was the only "subject matter inquired of" by the first ten interrogatories. There was no other interrogatory or answer upon that subject matter. All that the defendant had said upon that was read to the jury. In *Churchill* v. *Ricker*, 109 Mass. 209, upon which the defendant relies, it was held that the "subject matter inquired of" was not the particular fact covered by the interrogatory, "but the matter put in issue by the pleadings and thus inquired of," and that since one subject matter put in issue by the pleadings in the case was whether or not the defendant was negligent in leaving open and unguarded a hole in a sidewalk, all the answers of the defendant bearing upon that issue should be read if any of them were.

But this is far short of saying that if the answers bearing upon only one issue are read, the answers upon all other issues must be read. The "subject matter inquired of" in these first ten interrogatories was the matter put in issue by a denial of the genuineness of the signatures and nothing else.

Digitized by Google

The bill of exceptions is not very clear respecting the use made of the amended answer in the closing argument of the plaintiff's counsel. The real defence relied upon at the trial was that set up in the amended answer, namely, that the consideration for the note in suit was an agreement on the part of the plaintiff to prove against the estate of the defendant in insolvency certain prior notes held by the plaintiff and indorsed by the defendant, and to vote for the latter's discharge.

In the course of the trial the evidence was conflicting as to whether the note was signed and delivered at the Traders' Bank, as claimed by the defendant, or at the plaintiff's office, as claimed by the plaintiff; and whether at the time of the delivery of the note the defendant, as claimed by him, was ignorant that such an agreement was illegal, or, as claimed by the plaintiff, knew that such an agreement was illegal.

In his closing argument to the jury the counsel for the defendant virtually admitted that his client was wrong "as to where the note was signed," and continuing said that "if the defendant had testified that the note was signed in the plaintiff's office on February 15, he (the defendant) would have had a better case and a less troublesome case, and that he (counsel) wished the testimony had been the other way on this point, so far as his duty as attorney was concerned, and argued that even if the conversation before the bank took place on February 7, and the note was signed in the plaintiff's office on the 15th, this was immaterial." Counsel for the plaintiff in his closing argument claimed that a "radical change of position by counsel during the progress of a trial, as to material facts, indicated that his client had deceived him as to the facts, and that there had been such a change of position by counsel for the defendant in the present case; and in support of this contention counsel for the plaintiff compared the amended answer, the opening to the jury of counsel for the defendant, and the direct testimony of the defendant and the witness Hutchinson on the one hand (in all of which it was stated that the note was given before the defendant was advised of the illegality of the alleged agreement, and that as soon as he was so advised he repudiated that agreement), with the closing argument of counsel for the defendant on the other hand. In the course of this argument counsel for the plaintiff proceeded to

Digitized by Google

read the amended answer, to which counsel for the defendant objected. The court overruled the objection and permitted counsel for the plaintiff to read the answer, to which ruling the defendant duly excepted."

While this statement as quoted from the record is somewhat indefinite, still we construe the record to mean that the plaintiff's counsel read the amended answer, not simply to indicate the issue raised thereby, but also as evidence that the counsel when he drew it was deceived by his client, for he "compared" the allegations of the amended answer with the position of counsel at the close, and he made that comparison in support of the argument he was urging and in connection with certain other things upon which he relied as evidence in support of his argument. And we are confirmed in that view by the following statement in the plaintiff's brief: "It must be particularly observed that this comment did not in any way treat the answer as evidence, or attribute it to the defendant; on the contrary, it was treated as a pleading merely, and attributed solely to counsel, who had drawn and filed it in the presence of the jury. The entire comment was upon the attitude of counsel, and his shift of position."

And we are still further confirmed in this view by the following language in the charge of the court: "The pleadings are generally drawn by the attorneys in the case, and their clients are not parties to that, and, therefore, usually, the parties to the pleadings are not responsible for them, and they are not to be treated as evidence against them, except so far as they authorize them and direct them and have knowledge of them."

There would seem to be no reason thus to charge the jury as to the pleadings in a case on trial unless the intent was to allow the jury to use the allegations of the answer as evidence according as they should find that the defendant did or did not know what they were.

Pub. Sts. c. 167, § 75, is as follows: "Neither the declaration, answer, nor a subsequent allegation, shall be deemed evidence on the trial, but allegations only whereby the party making them is bound." See also St. 1851, c. 233, § 112; St. 1852, c. 312, § 75.

In *Walcott* v. *Kimball*, 13 Allen, 460, the history of the legislation upon this statute is given, and it was there said that not

Digitized by Google

only is it improper to use the answer as evidence, but that since it is not evidence counsel should not comment upon it as such in the closing argument.

In *Phillips* v. *Smith*, 110 Mass. 61, there was an amended declaration upon which the cause was tried before a jury. This was different from the first declaration. The original declaration was read to the jury by the defendant and commented upon in argument as contradictory of the plaintiff's testimony and additional declaration, and it was held by this court that the original declaration "could not be used or commented on as evidence," and the plaintiff's exceptions were sustained.

The case of *Taft* v. *Fiske*, 140 Mass. 250, closely resembles the case at bar. There the defendant, in offering certain evidence in support of one ground of defence, was met by the objection that that ground of defence was not open to him under his answer. Whereupon he sought and obtained permission to file an additional answer, and he filed it during the trial. "The plaintiff's counsel, in closing, argued that the filing of this amendment during the trial showed that the defence so pleaded was a 'put up' defence, not relied on when the original answer was filed; that its filing during the trial should 'be taken into account; that not one word was said about all this in the original answer'; that the fact that this defence was not set up 'until the trial was partly through, was to be considered,' with other arguments of a similar nature." The defendant asked the court to rule "that the fact that the defendant amended her pleadings during the trial, setting up an additional or more specific defence, was not a subject of comment, and that 'the fact of such amendment should not influence or affect their judgment upon the facts of the case.'" The judge declined to give it, and the defendant's exceptions were sustained.

Devens, J., in giving the opinion, says that "the plaintiff concedes that the contents of an answer are not the subject of comment; but contends that the fact of its filing may be. This is to draw too nice a distinction. The fact of its filing was perfectly unimportant in the case at bar, except as connected with the contents of the amended answer." And the decision proceeds to show the reasons for the rule which it is unnecessary here to repeat.

Digitized by Google

In the case at bar it was legitimate for the plaintiff to argue that the defendant had deceived his own counsel as to the facts, and in support of such a position to contrast the opening argument of the counsel for the defendant and the testimony of the defendant and Hutchinson as to such facts on the one hand, with the closing argument of the same counsel on the other hand.

In so doing he was dealing with the evidence and the conduct of the counsel.

But he had no right to comment upon the amended answer or the allegations contained therein, nor upon the fact that it was filed after the trial was begun, nor upon the time of its filing as having any bearing whatever upon the argument he was making.

Nor is it material that the plaintiff was stating only what had taken place in the presence of the jury. The jury in their deliberation have no right to consider evidence which is inadmissible even if they have heard it, nor does the fact that the amended answer was filed in their presence warrant them in considering it unless otherwise they would be so warranted. In this case the defendant would have been entitled to a ruling that the jury should not consider the allegations of the answer or the circumstances under which it was filed as evidence of anything. *Taft* v. *Fiske*, 140 Mass. 250.

The use made of the answer, we think, was not proper; and while it is not stated in the record that the defendant objected to the argument, still it is plain enough that the objection was to the reading of the answer as a part of the evidence upon which was based the argument that the defendant's counsel had been deceived by his client. We think that the exception to the reading of the answer for this purpose must be sustained. See the cases above cited.

It is unnecessary to consider the other exceptions, as there must be a new trial.

*Exceptions sustained.*

Digitized by Google

## CATHERINE J. EAVES *vs.* ATLANTIC NOVELTY MANUFACTURING COMPANY.

Suffolk. December 15, 1899. — June 20, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Employers' Liability Act — Evidence justifying a Verdict for the Plaintiff.*

In an action for personal injuries under the employers' liability act, St. 1887, c. 270, evidence which, though contradictory, justifies a finding that T. was a person whose principal duty was that of a superintendent; that as such superintendent he gave to the plaintiff the order to start up the machine; that at the time of the order he had reason to know that the plaintiff might understand it as a command to try to ascertain by resuming his work whether the machine was all right; that he so understood the order and was justified in so understanding; that, acting thereon, he attempted to resume work; that while so doing and in the exercise of due care, by reason of the violent and unusual shaking of the machine, his hands were thrown from their usual place and the presser came down upon his fingers and crushed them, and that under the circumstances the order was negligent, makes a case for the plaintiff.

TORT, for personal injuries occasioned to the plaintiff by having her fingers cut off in a machine, known as an ending machine, while in the employ of the defendant. Trial in the Superior Court, before *Bishop*, J., who submitted the case to the jury upon the second count of the declaration, which was under the employers' liability act, St. 1887, c. 270, § 1, cl. 2, and instructed them, among other things, as follows:

"The plaintiff claims under the second count that she was injured by reason of the negligence of a person in the service of the defendant intrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence, whereby the iron bar or presser of the machine fell with extraordinary force and crushed the fingers of the plaintiff as it came down. The question for you is, under this count, whether a person, exercising superintendence as his principal duty, negligently ordered the plaintiff to start up the machine, when he had reason to know that it was in an unsafe condition to start up, and dangerous for a person in the plaintiff's position to obey the order, and while she did not know the same, and whether



Digitized by Google

by means thereof in the starting up of the machine her hands were thrown under the presser, she exercising due care. . . .

"Mr. Talbot, according to the testimony, had come there with an oil can, and perhaps with a wrench, — but whether with a wrench or not is in dispute, — and had undertaken to see what was the matter, . . . and the plaintiff had stopped the machine for him as he came there. Now, if Mr. Talbot was a person exercising superintendence as his principal duty, if in the exercise of superintendence and as an act of superintendence he negligently ordered the plaintiff to do something which was the cause of her injury, she using due care, she may recover; and that is the question.

"If he was not a person exercising superintendence as his principal duty, and of that you must judge upon the evidence, then the plaintiff cannot recover under this count. And if he did not do a negligent act in the exercise of his superintendence in what he did, then she cannot recover. And she must be, in order to recover, in the exercise herself of due care. The plaintiff's claim about it is that she was at work on this machine, and it had been off and on for a few days; that it was apparent something was the matter with it; what, she did not know; that it skipped, and it had shaken some; and that this condition of things having been called to the attention of Mr. Talbot, he came around to see what was the matter, and to remedy the trouble if there was any, and that he was a superintendent. As to that you must judge, and you will determine from the testimony whether he was a person whose principal duty was that of superintendence. He was a part owner at that time, I believe, and he had certain duties connected with the business of the factory; whether they were such that you can say he exercised the duty of superintendence as his principal duty will be for you to determine. The plaintiff's contention is, he did exercise superintendence as his principal duty, and that coming around there to discover the trouble and remedy it, and getting down behind the machine, he did a negligent act and just what he ought not to have done, in ordering the plaintiff to start the machine up, when it was dangerous for her to do so; that the consequences of that order and of her obeying the order to start the machine up were that it shook violently, that the machine did not operate at

Digitized by Google

once; and the plaintiff asks you to infer it was out of order and seriously out of order from the fact that it did not operate; and that the violent motion connected with the attempt to start up the machine threw her hands from where they were holding the box on the block up on the plate or block, and the presser came down and caused the injury.

"The gist of that claim is that the plaintiff obeyed the order of a man who exercised, as his principal duty, superintendence, which order was negligently given by him, — given by him, that is, under such circumstances that he fairly should have known it was a dangerous thing for her to attempt to comply with it.

"The defendant denies that Mr. Talbot was a person exercising superintendence as his principal duty. The name 'superintendent' is of little consequence, though it may have some tendency to show that a man is superintendent if he is called so by the people in the establishment; but if he is not called so he may be called by any name and yet he may exercise superintendence, that is, the overseeing of things and of the people, as his principal duty. The defendant says he was an owner, and that he had certain other duties, and that the evidence does not show he did exercise superintendence as his principal duty. The defendant says it was not a negligent thing that Mr. Talbot did. In order to investigate he must see how the machine in its then condition would work, and therefore he says that he told her to put her foot on the treadle. The language of the witness was to 'start up,' and the defendant says that did not necessarily tell her to put her hands in a position where a violent motion would get them on the block. And the defendant says that whatever Mr. Talbot did, the plaintiff knew about the condition of this thing, and if it were a dangerous condition, if the machine were out of order.

"These are the contentions of the two sides. It is for you to say what the order or direction to start up means. If the fair meaning of that language, to the mind of the plaintiff, was that she, standing where she was, should put her foot on the treadle and keep her hands where she ordinarily had them, on the box, that is one thing; but if the fair meaning was that she should simply start the treadle, keeping her hands away, or that it was not an order which fairly could be held to include, to her

Digitized by Google

apprehension, the putting of her hands on the box,—that is another thing. To start up the machine could be accomplished simply by her putting her foot on the treadle. I think you are called upon to determine what would be the fair interpretation which the plaintiff would be justified in gathering from that language. Mr. Talbot was behind the machine; the plaintiff was in front of it, standing, I suppose; she had put a box on, and was apparently in the act of operating the machine upon that box when Mr. Talbot came along and told her to stop. She stopped, and the box was on and in an incomplete condition; the operation of putting the end on was not completed. When he got behind the machine and said 'Start up,' if that was the language used, what might she fairly infer from that? The order would have been complied with if she had stood back and put her foot on the treadle, but might she fairly infer that she should put her hands where she usually put them, or keep them where she had had them after the box was put on to the block, upon the box around the block and near the top? If she was justified by the form of the direction in keeping her hands there while she was starting up, then she was not negligent, so far as that was concerned, in keeping her hands there. But if she might fairly have understood, and ought to have understood, when he said 'Start up' he meant simply to work the lever operated by the treadle, that is another thing. He did not give her an order to work the machine in the sense of making a box, probably. He did give her an order to start up, which would include the working of the machine or the operating of the machine to the extent of revolving the parts which he was examining so he might see what was the matter. The question is, whether she might fairly enough have inferred, properly and fairly inferred, that she should do that in the way in which she operated the machine, for instance, when she was going to make a box. I instruct you that if the plaintiff understood the danger, or the condition creating the danger, she cannot recover. That is involved in all I mean to say to you. If the plaintiff when ordered to start up the machine attempted to act otherwise than as she might fairly understand she was to do, by the order and direction of Mr. Talbot, according to what she might fairly gather from that as to what she was to do, or if she acted regardless

Digitized by Google

of the effect of what Mr. Talbot was doing behind, she cannot recover.

"Upon the second count you will return such a verdict as you find by a solution of these questions: Was the plaintiff injured through the negligence of a person who exercised superintendence in that factory, as his principal duty, in the exercise of superintendence in giving the order, the plaintiff herself being in the exercise of due care? That involves the question of the capacity in which you think Talbot was engaged in the factory, the character of the order which he gave, the character of the act she performed in compliance with the order, as I have stated, and the question whether she herself had reason to think or suppose that she was doing a dangerous act."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*T. W. Proctor*, for the defendant.

*M. J. Creed*, (*J. P. Crosby* with him,) for the plaintiff.

HAMMOND, J. It will serve no useful purpose to recite in detail the evidence in this case. It was contradictory, but we think it would warrant a finding that Talbot was a person whose principal duty was that of a superintendent; that as such superintendent he gave to the plaintiff the order to start up the machine; that at the time of the order he had reason to know that she might understand it as a command to try to ascertain by resuming her work whether the machine was all right; that she so understood it and was justified in so understanding it; that, acting under that understanding, she attempted to resume her work; that while she was doing that and in the exercise of due care, by reason of the violent and unusual shaking of the machine her hand was thrown from its usual place and the presser came down upon her fingers and crushed them; and that under the circumstances the order was negligent. This would make a case for the plaintiff.

Under the instructions, which were full and appropriate to the issues, the jury must have found the facts to be as above stated.

*Exceptions overruled.*

Digitized by Google

## EDWARD O. COOKE *vs.* ROSCOE M. PLAISTED.

Suffolk. January 10, 1900. — June 20, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Contract for Services as Attorney — Instructions — Declaration in Set-off — Assignment for Benefit of Creditors — Reasonable Compensation — Termination of Trust — Auditor's Report — Evidence as to Foreclosure Proceedings — Testimony of Expert upon Mental Condition.*

If, in an action for services performed and disbursements made, as an attorney at law, for the defendant, the account is a long one and the items relate to many different matters, the judge cannot be required to instruct the jury in regard to each item, nor in regard to all of the various aspects in which it is possible that the jury may view the different items. What he is required to do is to state for the guidance of the jury the rules of law in regard to the right of an attorney to recover for services, and in regard to the defendant's liability therefor, and what it is necessary for the plaintiff to show in order to maintain his action, accompanied by such explanations and references to the nature of the services rendered and the relations of the parties and the matters set up in defence, including the declaration in set-off, as will enable the jury to understand and apply the rules thus laid down; and having thus instructed the jury, he cannot be required to instruct them as to the various aspects in which the plaintiff may have acted as attorney for the defendant in connection with matters relating to an assignment of his property by the defendant to the plaintiff for the benefit of the defendant's creditors and to the trust created thereby, and to his right to recover reasonable compensation for services so performed.

If, in an action for services performed and disbursements made, as an attorney at law, for the defendant, the fair import of the charge was, and the jury must have so understood it, that if the plaintiff was employed as attorney by the defendant, and performed services for him in that capacity in relation to any matters, he was entitled, in the absence of any special agreement, to a reasonable compensation therefor, taking into account the nature and importance of the services rendered, there being no contention by the defendant that to the extent to which the plaintiff's services and expenditures as attorney related to property covered by an assignment of the defendant's property to the plaintiff for the benefit of creditors, the plaintiff was obliged to resort to such property for payment, certain requests for rulings to the effect that if, after the termination of the assignment, the defendant requested the plaintiff to render service or expend money in relation to the property covered by the assignment, the defendant was liable to the plaintiff, and that if a note in an insolvency matter, even if originally included in the assets covered by the assignment, was proved by the defendant as his own property and in his own name, he was liable to the plaintiff for all services done and expenditures made relating to the note, were rightly refused.

In an action for services performed as an attorney at law for the defendant, a request for a ruling that "if the jury shall find that the services" in a certain suit "were rendered in whole or in part for the real benefit of others in connection

Digitized by Google

with the defendant, yet if he promised to pay the plaintiff for them he must be charged for what they were reasonably worth," is rightly refused, there being no contention by the defendant that he was not liable for services rendered in connection with the action, if they were in whole or in part for the benefit of others.

If an assignment in trust by A. to B. for the benefit of A.'s creditors was substantially terminated at a certain date, in an action by B. against A. for services rendered as an attorney at law, a request for a ruling that "the termination of a trust created by writing need not be in writing. It may be determined by agreement or consent, or by the acts of the parties in interest," becomes immaterial and is properly refused.

In an action by B. against A. for services rendered as an attorney at law, a request that "if the jury shall find that the sums mentioned in the defendant's declaration in set-off, or any of them, were received by the plaintiff as a part of A.'s assets, passing by virtue of the assignment [of A.'s property to B. and F. for the benefit of creditors], they were received by the plaintiff, together with F.; that they are not a proper subject of set-off in this action, and the verdict of the jury as to such items, or any of them so received, must be for the plaintiff," is rightly refused, and the case having been left to the jury becomes immaterial, B. being severally and personally liable, and not jointly with F., for the money which he had himself received and with which he had credited A.

Counsel cannot argue upon his brief the question of the competency of an auditor's report, if the exceptions do not show that any objection was made to its admission or exception taken.

In an action for services performed as an attorney at law for the defendant, the plaintiff cannot object to the admission of testimony relating to foreclosure proceedings and to the deed under the power contained in the mortgage, he having already testified to the foreclosure proceedings, and his services in regard to them being the subject of one or more of the items in his account.

In the case of interrogatories propounded to a physician as to P.'s mental condition, his ability to manage his affairs, and whether F., who was in close personal relations with P., made any statement to the deponent as to P.'s "mental competence to manage his own affairs, and if so, what?" answers to the effect that P. was weak and depressed and appeared to be under the influence of F.; that he was unfit to manage a business of any kind, and that F. said that P. was not competent to manage his business, and that, as he had a good deal of money, he (F.) felt that he wanted to help him along, and so took him under his protection, are clearly competent, the answer as to the statement of F. being admitted in contradiction of F., who had previously been asked upon cross-examination as to P.'s mental condition.

CONTRACT, to recover a balance of $2,681.21 for services rendered as an attorney, and cash paid by the plaintiff for the defendant. The answer set up, among other things, that the employment of the plaintiff was for the limited purposes of getting the defendant a discharge from his debts, and of litigation with the defendant's wife; that the defendant was mentally unsound, and incapable of making a contract; and that the plaintiff and one John A. Fowle had conspired together to

Digitized by Google

defraud him of his property. The defendant also filed a declaration in set-off.

At the trial in the Superior Court, before *Blodgett*, J., it appeared that from April, 1889, to December, 1892, the plaintiff was attorney for the defendant, and was, with Fowle, from April 20, 1889, to January 2, 1890, trustee for the defendant under an assignment for the benefit of the defendant's creditors. Certain moneys received by the plaintiff from the defendant personally, and in the settlement of his business, were credited.

There was evidence that the plaintiff did in fact render legal services for the defendant relating to matters growing out of the settlement of his business; that he acted for the defendant in several suits arising from complications with his wife, with reference to his real estate, but otherwise did nothing in the active settlement of his business affairs; but Fowle, the co-trustee under the assignment of April 20, 1889, testified that the plaintiff knew and concurred in all that was done, being in constant communication with him, and the defendant testified similarly; that from said April 20, 1889, to January 2, 1890, funds realized from the sale and collections of the defendant's assets were in bank in the joint names of the plaintiff and Fowle, as trustees, and the plaintiff jointly, and with Fowle as co-trustee, signed checks against this deposit; and that this was his performance relating to the settlement of the business affairs of the defendant. There was evidence that on said January 2, 1890, all of the assets of the defendant had been realized upon except two or three claims against third persons, all of his creditors had been paid, and that the trust was then closed, but the defendant testified that he had never been informed of any termination of it.

No charge was ever made by the plaintiff againt the defendant for services as his trustee, except that contained in the following, which is item 239 in the plaintiff's account: "July 28, 1892. Consultation and advice, correspondence and services in various other matters, including my services as your trustee in assignment for the benefit of your creditors, not heretofore charged, $100." Among the assets of the defendant's estate, and included in the assignment, was a claim against one Barrett and Company, who had gone into insolvency, and had offered

Digitized by Google

in composition to pay ten cents on each dollar of their indebtedness. The defendant's claim against Barrett consisted of promissory notes made by Barrett, and indorsed and paid by the defendant. One of these notes the defendant proved against Barrett's estate in insolvency in his own name, and there was evidence tending to prove that the defendant was frequently in attendance upon the insolvency court when the Barrett case was before it. One of the notes was proved in the name of the plaintiff. Upon this offer of composition a discharge was granted to Barrett and Company on July 24, 1890, and on November 17, 1890, the plaintiff appealed therefrom to the Supreme Judicial Court. This court dismissed the appeal. *Cooke* v. *Barrett*, 155 Mass. 413. Among the assets of the defendant was a chose in action against one Matthew Robson, who in the lifetime of the defendant's father had been engaged with him and the defendant in tanning hides and leather. The elder Plaisted, in the name of his son and himself as copartners, had filed a bill in equity against Robson for an accounting; the matter had been referred to a master. At the defendant's request the plaintiff, in July, 1899, entered his appearance in the suit. After doing so, there was evidence that he performed the services charged in his account, and also tending to show that the defendant had knowledge of all that the plaintiff did, approved it, and promised to pay for it. The defendant produced evidence tending to show that the plaintiff had agreed to conduct this litigation to its end, and rely upon the proceeds, if any, for his pay and the expenses. This the plaintiff denied. The bill was dismissed.

There was evidence that the mother of the defendant, as executrix of her husband's will, was interested in the outcome of this suit, and that other persons who had received an assignment of one half part of the claim alleged to be due from Robson were likewise interested, and that a verdict against Robson would inure to their benefit.

Before the date of his assignment to the plaintiff and Fowle, the defendant had owned a house, numbered 1 Taylor Street, in Boston. Through one Kingsbury he had conveyed this property by deed or deeds, which had never been recorded, to his wife. Subsequently, and prior to the assignment to the plaintiff and Fowle, the defendant had obtained possession thereof, and it

Digitized by Google

had been destroyed. One of the results of the litigation with the wife, conducted by the plaintiff for the defendant, was that she, in January, 1890, relinquished all rights in this property to the plaintiff and Fowle, as trustees. The property was subject to a mortgage to one Heald. This mortgage was assigned to one White, who, on September 2, 1892, by advice of the plaintiff, foreclosed, and the property was conveyed to Fowle. The plaintiff testified that this transaction was for the purpose of relieving the property of an incumbrance held by the city of Boston. The defendant testified that he did not understand the purpose and effect of it. The defendant offered to prove foreclosure proceedings and the deed under power contained in the mortgage, services for these proceedings having been charged in the plaintiff's account annexed. The plaintiff objected. The judge admitted the evidence, and the plaintiff excepted.

The defendant introduced, as tending to show his mental condition, the deposition of one Cutter, a physician, to whom he was taken by Fowle, on April 3, 1889, for examination of his physical condition. Cutter deposed that he had made an examination of the defendant; that he had had a large and varied experience in mental diseases and conditions extending over thirty-five years; that he had been a qualified examiner of New York for two years, and during his experience he had probably examined upwards of a hundred persons, not including hospital cases. The plaintiff objected to the introduction of the deposition, and particularly to the answers to interrogatories six, eight, and nine. The deposition was admitted, and the plaintiff excepted.

Interrogatories six and eight, and the answers thereto, are as follows: "*Q.* 6. Did you examine Mr. Plaisted, when you first saw him, with reference to his mental condition, and if so, what did you find it to be? *A.* I did, quite thoroughly, though his mental weakness was very apparent. He was brought to me by Mr. Fowle, as I have said, as one would bring a child, and appeared to be under the influence of Mr. Fowle as a child might be. This weakness was very clear. He was very much depressed. He had no confidence in himself whatever, but wanted to rely upon others and to confide in others. This inclination was very manifest, both from his action and his talk.

Digitized by Google

He was fickle, and seeking guidance and influence, and with a strong inclination to lean on some one. He talked much of his family wrongs, and wanted to confide in some one as to them, and to be helped out of them. In every way, in his personal appearance, his face, in his actions and in his words, this mental weakness, lack of independence, and inclination to confide in and lean on others was unmistakable. — *Q.* 8. What would you say as to Mr. Plaisted's ability to manage business affairs, as we generally understand business, either for himself or others, — to carry on a trade, or to buy and sell real estate, for instance, — and if you consider his business ability good or bad, why so? *A.* I should say he was at that time utterly unfit to manage a regular business of any kind, if I understand your question as involving reasonably large affairs and personal responsibility. I would not consider a child competent to carry on business, or to buy and sell land; and I have said Mr. Plaisted was, mentally, like a child. He was weak-minded, vacillating, had no sound, permanent judgment. He wanted protection and guidance, and to have the opinion of some one else, and to have some one else to lean on. When a person is brought to me by some one else, as Mr. Plaisted was, I judge he is incompetent to manage his own affairs, and if his own, surely others'. His mental weakness was such as to make him unreliable and of poor judgment."

In interrogatory nine the witness was asked: "Did Mr. Fowle make any statement to you as to Mr. Plaisted's mental competence to manage his own affairs, and if so, what?" To this question the plaintiff objected. The objection was overruled, the judge stating that the question was admissible for the purpose of contradicting Fowle, who had previously been asked, upon cross-examination, as to the mental condition of the defendant. To this admission the plaintiff excepted. The witness answered: "Mr. Fowle said he was not competent to manage his own business, and that, as he had a good deal of money, he felt that he wanted to help him along, and so took him under his own protection."

The plaintiff asked the judge to instruct the jury: 1. If the jury find that the plaintiff accepted the trust created by the assignment of April 20, 1889, and acted under it, that accept-

Digitized by Google

ance and action does not preclude him from acting as attorney for the defendant in matters pertaining to the assignment, and receiving from the defendant, personally, reasonable compensation therefor. 2. Notwithstanding the assignment to the plaintiff and John A. Fowle, the defendant still had a right to a voice in the management of his affairs, the collection of his assets, and the settlement of his debts. If in such management he acted independently of his assignees, and caused action to be taken by the plaintiff as an attorney, the plaintiff may recover from him the sums of money paid out by him in pursuance of such action, and a reasonable compensation for his services therein. 3. Notwithstanding the recital in the deed of April 20, 1889, that the expenses of the settlement of the defendant's business should be deducted from the assets collected, this plaintiff may have his election, either to recover from the assignees the value of his services rendered in such settlement, or he may recover from the defendant such sums as his services are worth. 4. If the possession of the property covered by the deed of April 20, 1889, was retained by the defendant, sold by him, and the proceeds diverted by him to his own or another's use, he is personally liable to this plaintiff for services rendered and expenditures made by the plaintiff at the request of the defendant in reference thereto, notwithstanding that this deed provides that payment of the expenses and charges shall be made out of the proceeds of the trust property. 5. If the defendant, after executing the trust deed, kept possession and disposed of the property covered by the assignment of April 20, spending and investing the proceeds for his own use and benefit, he cannot avoid the plaintiff's claim for services and expenditures rendered and paid at the defendant's request, although the terms of that conveyance may have otherwise provided. 6. If the jury shall find that the sums mentioned in the defendant's declaration in set-off, or any of them, were received by the plaintiff as a part of the defendant's assets, passing by virtue of the assignment of April 20, 1889, I rule, as a matter of law, that they were received by the plaintiff, together with John A. Fowle; that they are not a proper subject of set-off in this action, and the verdict of the jury as to such items, or any of them so received, must be for the plaintiff. 7. The termination of a trust created by

Digitized by Google

writing need not be in writing. It may be determined by agreement or consent, or by the acts of the parties in interest. 8. If the jury shall find that the trust relations created by the deed of April 20, 1889, terminated between the plaintiff and defendant by consent, or otherwise, on or about January 2, 1890, or at any time, and the defendant thereafter requested the plaintiff to render service or expend money, the defendant is liable to the plaintiff, notwithstanding such services and expenditures related to property claims or assets covered by the assignment. 9. If the jury shall find that one of the notes in the Barrett insolvency matter was proved by the defendant as his own property and in his own name, he thereby became personally interested in the result of the insolvency litigation, and is liable to the plaintiff for all services done and expenditures made by the plaintiff relating to this note. The verdict of the jury upon such services and expenditures on said note so found to have been proved must be for the plaintiff, even if this note was originally included in the assets covered by the assignment of April 20. 11. If the jury shall find that the services for the Robson suit were rendered in whole or in part for the real benefit of others in connection with the defendant, yet if he promised to pay the plaintiff for them he must be charged for what they were reasonably worth. 13. The rule to the auditor required him, among other things, to "state the account between the parties." As his report is not in compliance with this order, it is not *prima facie* evidence of the right of recovery in the party in whose favor it is made.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

*H. H. Pratt & E. W. Mitchell*, for the plaintiff.

*W. P. Hale*, for the defendant.

MORTON, J. The plaintiff seeks to recover for services performed and disbursements made for the defendant as an attorney at law. The services began in connection with an assignment made by the defendant for the benefit of his creditors, in which the plaintiff was one of the assignees or trustees. The account, which is a long one, includes, however, only one item in which a charge is made for services as assignee or trustee, and that embraces also services rendered as an attor-

Digitized by Google

ney. It fairly may be said, therefore, that the action relates to the plaintiff's services and disbursements as an attorney at law for the defendant. The answer sets up various matters in defence, and there is also a declaration in set-off. The jury returned a verdict for the defendant on the declaration in set-off. At the trial the plaintiff excepted to the admission of certain testimony and the refusal of the presiding judge to give certain rulings requested, — fifteen in all. Of these, one, the fourteenth, was waived at the trial, and the tenth, twelfth, and fifteenth have not been pressed, and we therefore treat them also as waived. The case is here on the plaintiff's exceptions. Not all of the evidence is reported, nor all that is material to the questions raised.

The account, as already observed, is a long one, and the items relate to many different matters. It is manifest that the presiding judge could not be required to instruct the jury in regard to each item in the account, nor in regard to all of the various aspects in which it was possible that the jury might view the different items. What he was required to do was to state for the guidance of the jury the rules of law in regard to the right of an attorney to recover for services and in regard to the defendant's liability therefor, and what it was necessary for the plaintiff to show in order to maintain his action, accompanied by such explanations and references to the nature of the services rendered and the relations of the parties and the matters set up in defence, including the declaration in set-off, as would enable the jury to understand and apply to the case before them the rules thus laid down. And this, it seems to us, is what the presiding judge did. Having thus instructed the jury he could not be required, we think, to instruct them particularly as to the various supposable aspects in which the plaintiff might have acted as attorney for the defendant in connection with matters relating to the assignment and the trust created thereby, and to his right to recover reasonable compensation for services so performed. What has been said above applies to the first five requests. See *Hicks* v. *New York, New Haven, & Hartford Railroad*, 164 Mass. 424; *Moseley* v. *Washburn*, 167 Mass. 345. We think also that the eighth and ninth requests were properly refused. The fair import of the charge was, and we

Digitized by Google

think that the jury must have so understood it, that if the plaintiff was employed as attorney by the defendant, and performed services for him in that capacity in relation to any matters, he was entitled, in the absence of any special agreement, to a reasonable compensation therefor, taking into account the nature and importance of the services rendered. There was no contention on the part of the defendant, so far as the pleadings and exceptions show, that to the extent to which the plaintiff's services and expenditures as attorney related to property covered by the assignment he was obliged to resort to such property for payment. We think also that the eleventh request was properly refused. There was no claim on behalf of the defendant that he was not liable for services rendered in connection with the Robson suit, if they were in whole or in part for the benefit of others. It would seem, though we have not all of the evidence before us, that there was no real dispute; that the trust was substantially terminated in January, 1890, though the defendant testified that he had never been informed of any termination of it. How a trust could be terminated, which was the subject of the seventh instruction requested, was therefore immaterial, and that request was properly refused. The sixth request, in relation to set-off, was also properly refused. For the money which he had himself received and with which he had credited the defendant the plaintiff was severally and personally liable and not jointly with Fowle, and as the case was left to the jury by the presiding justice the instruction requested became immaterial.

The plaintiff has argued upon his brief the question of the competency of the auditor's report. But the exceptions do not show that any objection was made to its admission, or exception taken.

We see no valid objection to the admission of testimony relating to the foreclosure proceedings and to the deed under the power contained in the mortgage. The plaintiff had already testified to the foreclosure proceedings, and his services in regard to them were the subject of one or more of the items in his account.

The deposition of Dr. Cutter was clearly competent. The answer in regard to what Fowle said was admitted as tending to contradict Fowle, and was admissible for that purpose. No

Digitized by Google

specific objection seems to have been taken to any other questions or answers.

The objections to the testimony of Dr. Burt are not argued on the plaintiff's brief, and we treat them as waived.

*Exceptions overruled.*

---

SAMUEL F. BATCHELDER & others, executors, *vs.* CITY OF CAMBRIDGE.

Middlesex. January 22, 23, 1900. — June 20, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Abatement of Taxes assessed to Executors — Sworn List — Basis of Assessment — Statute.*

In this case, which was a petition for the abatement of taxes paid under protest by executors who had settled the estate and distributed the legacies within four months from the proving of the will, in September, 1896, the basis of assessment was the sworn list of the taxable personal property of the testator held by the executors on May 1, 1897, and filed on June 9, as of May 1; and the court rightly found for the executors.

PETITION to the assessors of the city of Cambridge for the abatment of certain taxes assessed to the executors of the estate of Alfred F. Washburn upon certain personal property, and an appeal from their decision to the Superior Court.

The case was submitted to that court, and, after judgment for the petitioners, to this court, on appeal, upon agreed facts, in substance as follows.

On May 1, 1896, the testator made to the assessors of Cambridge a correct sworn return of taxable personal estate valued at $19,000, for which he was assessed. He died on September 4, 1896, and his will was proved on September 22. The assessors taxed the executors for the year 1897 for the personal property, $19,000, the amount being $341.25. This assessment was made on September 1, 1897.

The taxable property of the testate was all personal, and at his decease was $31,545. Prior to January 24, 1897, this property was in part used to pay expenses of administration, in part

Digitized by Google

to pay debts, and in part was turned over to the legatees in accordance with the will. These legatees were in part non-taxable charities, in part persons who made returns for taxation (including the property thus received) in Cambridge in 1897, and in part persons who lived elsewhere or who made no returns. Only a small taxable balance in cash remained after January, 1897, in the executors' hands, which, on May 1, 1897, amounted to $514.92. No notice of their action was given to the assessors other than that hereinafter stated, save that on June 9, 1897, the executors duly filed with the assessors a list made out and sworn to of the taxable personal property of the testator held by them on May 1, 1897, namely, the aforesaid $514.92, but gave no account of the distribution of the estate. The assessors on August 6, 1897, made a written demand upon the executors for the account of the distribution, but received no reply. No inventory or account of the executors was filed in the probate office. Subsequently, however, on November 22, 1897, two of the three executors were in attendance before the assessors and answered all inquiries as to the nature and amount of the personal property left by the testator, and its disposal and distribution, and exhibited their accounts. This was after the first and before the second assessment. By the accounts it appeared that on January 16, 1897, the executors had in their hands personal estate estimated by them at the value of $126,000, $32,000 of which was in cash or taxable securities.

The assessors, on December 18, 1897, taxed the executors on the further amount of $14,000 of personal estate $227.50, making, with the amount of $341.25, as before stated taxed on September 1, 1897, a tax in all of $568.75, which the executors paid under written protest. The executors applied for an abatement thereof to the assessors, who refused to grant the application and to make an abatement, and gave notice in writing of their decision on February 11, 1898. The executors then brought this proceeding. The executors contended that they should only be taxed $9.01 on the $514.92, whereas the respondent contended that the tax of $568.75 was proper and legal.

If, upon the above facts, this tax of $568.75 was legal, judgment was to be entered for the respondent; but if illegal, judgment was to be entered for the petitioners to the amount of



Digitized by Google

$559.74, with interest from March 23, 1898. The judge found for the petitioners in the sum of $614.22.

*G. A. Pevey*, for the respondent.

*W. W. Vaughan*, (*H. G. Vaughan* with him,) for the petitioners.

MORTON, J. In *Vaughan* v. *Street Commissioners*, 154 Mass. 143, the executor had been assessed, and had paid taxes on the amount for which he was assessed, and the amount for which he was taxable was thus fixed for succeeding assessments, unless he brought in a list, and, in case of distribution, gave notice to the assessors of the names and residences of the distributees, and of the amounts paid to them. Pub. Sts. c. 11, § 20, cl. 7; c. 11, §§ 38, 44. In this case the executor had not been assessed at all, and consequently Pub. Sts. c. 11, § 48, does not apply. The question is, How was the amount for which the executor was to be first taxed to be determined, and as of what date was it to be determined? And we think that it was to be determined as of May 1, 1897, in this case, and in the same manner as the amount for which other taxpayers are to be assessed is determined, namely, by the list which was carried in, or, if a list had not been carried in, then the assessors were to ascertain as nearly as practicable the particulars of the estate for which the petitioners were taxable, and to make an estimate thereof at its just value, according to their best information and belief. In case an executor or administrator has been assessed, the amount of such assessment determines the basis of succeeding assessments, unless he brings in a list, and, if there has been a distribution, furnishes the list required by Pub. Sts. c. 11, § 20, cl. 7. If he has not been assessed, there is no basis except that provided in the case of taxpayers generally, which is the list that is required to be brought in as of the first day of May, or, if no list is brought in, then such information as the assessors are able to obtain otherwise. And, although the language of clause 7 may be broad enough, perhaps, to include cases where a distribution has taken place before an executor or administrator has been assessed at all, still, in the absence of any provisions by which the amount for which an executor or administrator shall be assessed in such a case is to be determined, except those relating to taxpayers generally, we think that it could not have been intended that any different rule should be applied to executors or administra-

Digitized by Google

tors so situated from that applied in the case of other taxpayers. This view is somewhat strengthened by the nature of the amendment made by St. 1894, c. 354, § 1, to Pub. Sts. c. 11, § 44. In the present case, the petitioners duly filed a list as required by the notices issued by the assessors, and afterwards, at the request of the assessors, answered all inquiries as to the nature and amount of the personal property left by the testator, and its disposition. We think that, according to the terms of the report, the entry should be, judgment on the finding for the petitioners.

*So ordered.*

---

## OLD COLONY RAILROAD COMPANY *vs.* F. P. ROBINSON COMPANY & another.

Suffolk. March 9, 1900. — June 20, 1900.

Present: KNOWLTON, MORTON, LATHROP, & HAMMOND, JJ.

*Eminent Domain — Taking of Vacant Land — Evidence as to Land with Buildings — Expert.*

At the trial of a petition by a railroad company for the assessment of damages for the taking of vacant land of the respondent, and for damage to his other land, the respondent having introduced without objection testimony of the price paid at a recent sale for a lot of land with a dwelling-house and stable upon it, situated near the land taken, on the opposite side of the street (although if objection had been made the evidence probably would have been excluded), he may be permitted to point out the difference between the two estates, for the purpose of giving the evidence its true value, if it can be done without embarrassing the case with collateral issues; but the opinion of experts cannot be received in regard to the effect, upon the value of the estate sold, of features wherein it differs from the estate whose value is to be ascertained, or their opinion in regard to any elements of value which enter into the price, for the purpose of aiding in applying the evidence of the sale to the issue before the jury.

PETITION for the assessment of damages under St. 1896, c. 321, for the taking of land of the respondents on April 24, 1897, and for damage to other land of theirs, caused by the widening and change of grade of Lagrange Street, a public way in that part of Boston formerly known as West Roxbury. The land actually taken was a strip of vacant land about ten feet wide

Digitized by Google

and about three hundred and twenty-one feet long, lying on the northerly side of Lagrange Street.

At the trial in the Superior Court, before *Blodgett*, J., the respondents introduced in evidence, without objection, the testimony of one Park of a sale made to him in August, 1895, by one Nichols, of a parcel of land with a dwelling-house and stable thereon situated on the southerly side of Lagrange Street, directly opposite the land taken. The area of the land sold was 8,967 square feet, and the price received for the property was $4,500. It did not appear that either the seller or the purchaser placed a separate value upon either the land or the buildings at the time of the sale, or that at the time any apportionment of the purchase price between the land and buildings was made by either of them. Park was still the owner of the property; and the counsel for the respondents asked him what was the fair value of the buildings at the time of the sale, but the petitioner objected, and the judge excluded the evidence.

One Spear, called by the respondents, testified that he lived near their land; that his occupation was that of a carpenter, builder, and contractor; that he had followed that occupation for forty-five years; that he knew the house bought by Park; that he knew when it was built, he having worked on it as an apprentice; that he knew about when the stable was built; and that he was well acquainted with the character and condition of the house and stable at the time of the purchase by Park. He was asked by the counsel for the respondents, "At the time of the sale to Park in 1895, in August, what in your judgment was the fair value of the house and stable?" The counsel for petitioner objected that the evidence was incompetent, but made no objection to the qualification of the witness. The judge decided that the question might be asked, and the petitioner excepted. Counsel for the petitioner said: "We object to that question for that purpose, and we suggest the value in connection with the property, the foundation, and everything that is there. I think he ought to understand that, and not what it was worth to be moved off." The judge observed, "Yes, I think he ought to understand that it is not a question of what it would be worth to be moved off." The counsel for the respondents then said, "I assumed that, and did not put

Digitized by Google

in the words 'market value,' for that reason," and then asked the witness, "What, in your judgment, was the fair value of the house and stable as they were there on the land at the time of the sale, to be used with the land?" The witness answered: "To be used with the land? $1,500."

The jury returned a verdict for the respondents in the sum of $8,874.76; and the petitioner alleged exceptions.

*A. F. Clarke*, for the petitioner.

*E. I. Baker*, for the respondents.

KNOWLTON, J. In this case the question for the jury was, what sum should be awarded to the respondents for damages for the taking of their land, and for injury to their remaining land. Their land was vacant at the time of the taking. They introduced without objection testimony of the price paid at a recent sale for a lot of land with a dwelling-house and stable upon it, situated near the land taken, on the opposite side of the street. If this had been vacant land, the price which it brought clearly would have been competent evidence on the question before the jury. *Patch* v. *Boston*, 146 Mass. 52. But with the buildings upon it the estate was so different in character from the other, that, if objection had been made, the evidence probably would have been excluded. *Armory* v. *Melrose*, 162 Mass. 556. It having been introduced without objection, it was open to the petitioner to show within reasonable limits, in the discretion of the presiding justice, that the estate was different in character from that taken, and that because of this difference the evidence was favorable to the petitioner, rather than to the respondents who introduced it. *Pierce* v. *Boston*, 164 Mass. 92. *Lyman* v. *Boston*, 164 Mass. 99. *Cherokee* v. *Town Lot & Land Co.* 52 Iowa, 279, 281. See *Hunt* v. *Boston*, 152 Mass. 168, 170. After such testimony is before a jury without objection, there is no good reason why the party that introduced it should not be permitted to point out the difference between the two estates, for the purpose of giving the evidence its true value, if it can be done without embarrassing the case with the collateral issues.

The question now before us is whether, in such a case, the opinion of experts may be received in regard to the effect, upon the value of the estate sold, of features wherein it differs from

Digitized by Google

the estate whose value is to be ascertained, or their opinion in regard to any elements of value which enter into the price for the purpose of aiding in applying the evidence of the sale to the issue before the jury.

The rule has been held very strictly that the opinion of experts as to the value of other lands is not to be received. In *Wyman* v. *Lexington & West Cambridge Railroad*, 13 Met. 316, 327, Mr. Justice Dewey uses language as follows: "Evidence of mere opinion as to the value of property is to be confined exclusively to the subject in reference to which damages are claimed. If you would aid the jury by reference to other articles, or other property similarly situated, the evidence in reference to such other articles or other property must be that of facts, and not opinions. It is only by reference to facts that exist respecting the property, that a comparison is to be made that may aid the jury in estimating the value of the property in relation to which they are to assess damages. To allow anything beyond this would be unnecessarily sanctioning the introduction of evidence of opinions of witnesses — evidence always somewhat objectionable in its character, and to be excluded as far as is practicable." This doctrine has often been recognized and reaffirmed in later cases. *Rand* v. *Newton*, 6 Allen, 38. *Shattuck* v. *Stoneham Branch Railroad*, 6 Allen, 115. *Phillips* v. *Marblehead*, 148 Mass. 326, 328. *Thompson* v. *Boston*, 148 Mass. 387. *Roberts* v. *Boston*, 149 Mass. 346, 354, 355. *Haven* v. *County Commissioners*, 155 Mass. 467. *Beale* v. *Boston*, 166 Mass. 53. It may sometimes happen, as in the present case, that the opinion of experts as to the value of some distinctive feature of the property, in which it differs from the estate taken, would be helpful to a jury; but ordinarily it would be distracting to a jury to take the opinion of experts as to the value of other lands which are compared with the land in question. It would be difficult to draw a line of distinction between cases which are to be treated as exceptions and those in which the general rule is to be applied. We are of opinion that it is unwise to introduce an exception in cases like the present, and that it is better to hold the rule absolutely, and leave the jury to judge for themselves in regard to the two estates compared, whatever differences may exist between them. Sales of other estates should not be

Digitized by Google

admitted in evidence unless the similarity of these estates to that in question is such as to make the evidence helpful without aid from the testimony of experts. Differences may be pointed out to a jury, but the effect of these differences should be left to their judgment.

We are of opinion that the testimony of the expert was wrongly admitted. *Exceptions sustained.*

---

THOMAS P. EMERSON *vs.* RICHARD H. PAINE & another, executors.

Middlesex. March 12, 1900. — June 20, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Insolvent Estate of Deceased Person — Promissory Note — Proof of Claim — Collateral Security.*

P., the maker of a promissory note, gave E. for his indorsement thereof a promissory note as collateral security, which was to apply to all renewals of the original note. The original note was three times renewed, and before the last renewed note fell due, P. died. *Held*, that although the bank which discounted this note had proved it against the insolvent estate of P., E. could also prove his claim on the note given him by P.

APPEAL from a decree of the Probate Court allowing the report of commissioners upon the insolvent estate of William H. Perkins, deceased, and from the disallowance of the claim of the appellant presented to the commissioners.

The case was submitted to this court, and after a finding for the appellees, by *Barker*, J., to the full bench on appeal, upon agreed facts, in substance as follows.

On July 20, 1896, Perkins made a promissory note for $5,000, and had it discounted at the Union Market National Bank of Watertown, it having been indorsed by Thomas P. Emerson, the appellant. Perkins, prior to and in consideration of such indorsement, and as collateral security therefor, gave Emerson a second mortgage on certain real estate in Watertown, and a mortgage note dated July 17, 1896, for $5,000. The first mortgage thereon, held by the Waltham Savings Bank, was subsequently foreclosed and the property under it sold, so that the collateral

Digitized by Google

security to the mortgage note held by Emerson was rendered of no value, and he had no collateral which he was obliged to surrender or offer to surrender before offer of proof of claim. It was agreed that the collateral security should apply to renewals of the note, and the original note discounted by the Union Market National Bank of Watertown when it fell due on November 23, 1896, was taken up with a new note for the same amount with the same maker and indorser. This second note when it fell due was taken up with a new note for the same amount with the same maker and indorser. This third note was paid before maturity, the money to pay it being obtained by the discount of still another note for $5,000, with the same maker and indorser, at the Newton National Bank in Newton. Before this last note fell due Perkins died, and the note had not been paid at the time of the hearing before the commissioners, though Emerson had waived demand and notice thereon, and had pledged collateral of his own upon it, at the request of the Newton National Bank. This last note was offered by the Newton National Bank for proof before the commissioners, and by them allowed for its full amount. Emerson testified before the commissioners that the mortgage note of July 17, 1896, was held by him as collateral for his indorsement, as herein stated.

*C. H. Tyler & O. D. Young*, for the appellant.

*G. S. Littlefield & H. R. Skinner*, for the appellees.

LATHROP, J. Both parties in this case have assumed that the note discounted by the Newton bank was a renewal of the original note discounted by the Watertown bank. Assuming it to be such, the only question is whether Emerson, the indorser, having a promissory note given to him as collateral security by Perkins, the maker, and which by agreement was to apply to all renewals of the original note, can prove his claim against the insolvent estate of Perkins, who has deceased, the Newton bank having proved the note discounted by it against said estate in full.

We see no reason why the claim cannot be proved. There is nothing in the Pub. Sts. c. 137, relating to the insolvent estates of deceased persons, or in our decisions, to prevent it. The note was given for a valuable consideration, namely, the lending by Emerson of the credit of his name to Perkins. An action

Digitized by Google

upon it could have been maintained by the holder against the maker in the lifetime of the latter; *Hapgood* v. *Wellington*, 136 Mass. 217; and it follows that it may be proved against his estate. *Moseley* v. *Ames*, 5 Allen, 163. *Miller's River National Bank* v. *Jefferson*, 138 Mass. 111.

Emerson does not seek to prove his claim as an indorser, nor does he ask the Probate Court for an order, under the Pub. Sts. c. 137, §§ 28–30, as the holder of a contingent claim, and the case, therefore, does not come within *Cummings* v. *Thompson*, 7 Met. 132, and *French* v. *Hayward*, 16 Gray, 512.

*Finding reversed.*

---

MARGARET WELCH, administratrix, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 13, 1900. — June 20, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Loss of Life — Railroad — Employers' Liability Act — Negligence — Due Care — Evidence — Dependence on Deceased for Support.*

A person stationed in the tower in a railroad yard, whose duty it is to move the switches upon receiving signals and orders from others in the yard, is in "charge or control" of a switch, within the meaning of St. 1887, c. 270, § 1, cl. 3.

If a switchman in the employ of a railroad corporation, engaged in shifting cars in the railroad yard, gives the man stationed in the tower the signal for a certain track by holding up a lantern and also shouting the number of that track, and the latter throws up his hand as a signal that he heard and understood him, and then so turns the switch that the cars are sent upon another track and injure the switchman, in an action for the injury there is evidence of negligence on the part of the tower man to be submitted to the jury.

In this case, which was an action under the employers' liability act, St. 1887, c. 270, as amended by St. 1892, c. 260, for causing the death of the plaintiff's intestate, there was evidence of due care on the part of the intestate which should have been submitted to the jury.

In an action against a railroad corporation for causing the death of a switchman in its employ while engaged in shifting cars in the railroad yard, owing to the negligence of the man stationed in the tower in so turning the switch as to send a train upon a track other than that for which the signal was given, evidence is competent to show that the train was coming much faster than the usual and ordinary rate of speed for cars which were being shifted at that place.

The opinion of a witness, not an expert, as to how far the voice of a switchman, who had shouted a direction to the man in the tower while engaged in shifting

Digitized by Google

cars in a railroad yard on a stormy night, could be heard in the storm, is properly excluded in an action against the railroad corporation for causing the death of the switchman.

Notice given in the midst of the trial, in an action against a railroad corporation, to produce its written rules, properly may be held to be insufficient to justify the introduction of secondary evidence to prove one of the rules.

The mother of an employee of a railroad corporation who had always lived with her and given her all his wages, which she used in the support of her family, although she also received from her husband and two daughters the wages earned by them, which she used in the same way, may be found to have been dependent on her son for support, within the meaning of St. 1887, c. 270, as amended by St. 1892, c. 260.

TORT, under the employers' liability act, St. 1887, c. 270, as amended by St. 1892, c. 260, to recover for the death of the plaintiff's intestate, Richard Welch, and for conscious suffering consequent upon injuries received while in the employ of the defendant. Trial in the Superior Court, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show the following facts: On November 5, 1894, Welch, the plaintiff's intestate, was in the defendant's employ as a switchman, and was one of a gang of men engaged in shifting cars and making up trains in the yard of the Park Square station in Boston. The accident occurred at fifteen minutes past ten o'clock in the evening, and there was a severe snow storm at the time, some of the witnesses testifying that it was the worst of the season. The shifting engine was on the south of the train, and was running back and forth across the Boston and Albany Railroad tracks, placing cars in various parts of the yard. This work was done on track No. 1, the main freight line, and Nos. 7 and 5, which ran off to the right towards Columbus Avenue. The conductor would give directions where he wanted the train to go, and it was the duty of the plaintiff's intestate to watch the conductor and transmit his signal to the head end of the train, and, if a switch was to be thrown, to signal the tower man, who would throw the switches.

A few minutes before the accident, the train then being south of the Boston and Albany Railroad tracks, the conductor told the tower man, in the presence of Welch, to let them in on track No. 1, down straight. Then he went north about four hundred or five hundred feet towards the Park Square station, stopping at a shanty near the tracks, called a switchman's house. At the

Digitized by Google

"dwarf switch," so called, there were two signals, which stood a foot or a foot and a half above the ground, one of which would show the figure 1, and when reversed the figure 7, and the other the figures 5 and 4, respectively. The switch signals were all iced up and blurred, so that one could not be distinguished from another. The conductor intended to send these cars on to the "rub dub" track, so called, which runs off to the right from track No. 1 about seven hundred feet north of the Boston and Albany Railroad tracks, but he found other cars on this track in his way. His train, which had come north on track No. 1, stopped opposite the switchman's house, and then had to go back across the Boston and Albany Railroad tracks so as to let the cars off of the "rub dub" track. The conductor stayed at the switchman's shanty, and, after his train had gone south of the Boston and Albany Railroad tracks, a train passed out over those tracks. Welch, in the mean time, was down at the brakeman's house near those tracks, almost opposite the tower. After the conductor saw that the "rub dub" track was clear, he held up his light, giving "high ball," which was the signal for his train to come up on track No. 1. He could not tell from the appearance of the switches for which track they were set, or which way the train was to go, but saw that "they got wrong."

When the conductor last saw Welch he was right in front of the brakeman's shanty, near the crossing. His place was there by the crossing, and the only instruction the conductor had given his men at that time was to go up on track No. 1. Welch took this signal, having stepped out of the switch house in which he had been standing, held up his lantern to the tower man, which was the signal for track No. 1, and shouted "On one," which meant "down straight." The tower man threw up his hand, indicating that he understood the signal. The train, which had on a large, powerful engine, backed up over the Boston and Albany Railroad tracks at the rate of fifteen or eighteen miles an hour.

When Welch gave the signal he was right in front of the brakeman's house, which is about six or seven feet from "three-house" track, so called. To go from the shanty to track No. 1 Welch would have to cross "three-house" track, from which

Digitized by Google

branches the "cattle track," so called, and another track, from which branch other tracks also. The train turned off to the right on "three-house" track, instead of going upon track No. 1, and Welch was found lying between "three-house" track and the "cattle track," about sixty feet north of the brakeman's shanty, having received injuries which resulted in his death.

The conductor of the train testified, on cross-examination, that the movements which were to be made with the cars were entirely under the control of the men on the ground, and all that the man in the tower had to do was to make the movements, by throwing his lever, required to carry out the signals and orders given him by the conductor or the switchman.

A witness for the plaintiff, who was a brakeman on the train in question, after stating that Welch held up a green light, which was used to signal the tower man and the train men, as a signal to the tower man for track No. 1, and shouted "On one," testified that Welch "had a good, strong voice, and always used it to the full extent." The witness was then asked, "On that night, in such a storm, how far could his voice be heard?" The judge excluded this question; and the plaintiff excepted.

One Maroney, a witness called by the plaintiff, testified that on the day of the accident he was working for the defendant in the night-shifting gang, in which Welch was switchman. He was then asked the following question: "How did the rate of speed at which the train was backing at the time Welch was struck, or at the time the train was by the switchman's shanty, compare with the usual or ordinary speed at which trains were shifted at the place and for the purpose?" This question was objected to and excluded; and the plaintiff excepted.

The witness having testified that the train was going at the rate of fifteen or eighteen miles an hour at the time the plaintiff's intestate was killed, was asked the following questions: "Was this the usual rate of speed for cars to be shifted in that yard? Was it a safe rate of speed in that yard at that time and place?" Each question was objected to and excluded; and the plaintiff excepted.

One Hoffman, who was the conductor of the train in question, testified that there were rules with reference to the rate of speed at which cars should be run in the freight yard; that they used

Digitized by Google

to have a private book for them, and he knew what they were, and that he had worked in the yards for two and a half years. He was then asked the following question: "From your general knowledge as a brakeman and conductor in those yards, do you know the rate of speed that cars are allowed to run in those yards?" and the plaintiff offered to show that the witness did know the rate of speed. The judge excluded this question; and the plaintiff excepted.

The witness further testified that he did not have that book with him.

The plaintiff's counsel then asked the defendant to produce the rules which governed the rate of speed of cars at that time. The defendant's counsel answered that on the Saturday preceding the trial, which was on Monday, he made an examination of the defendant's rules for the purpose of finding if there was any such rule, and could not find any.

The witness was then asked, "Do you know whether there was any such rule, or was at that time?" to which he answered, "There was at that time."

The following question was then put to the witness: "What was the written rule on the defendant's road at that time as to the rate of speed at which cars should be driven in shifting in that yard?"

The defendant's counsel objected to the question, contending that no foundation for secondary evidence had been laid. The judge so ruled, and excluded the question; and the plaintiff excepted.

The plaintiff testified that she was the mother of Richard Welch, her intestate, who was about twenty-seven years old at the time of his death; that he was not married, and had always lived with her; that he always gave his wages to her, and she spent the money on her family and her house for any purpose that she needed to use it; and that her husband was earning $1.25 a day, which he gave to her, and she spent the money so received on the house and the family. On cross-examination, she testified that, before her son's death her two daughters earned together from $8.50 to $10.50 a week, which was also given to her and used for the support of the family.

John Welch, called as a witness by the plaintiff, testified that

Digitized by Google

he was her husband and the father of Richard Welch; that he had worked for the defendant since 1872, and at the time of his son's death was earning $1.25 a day, and that this money he gave to his wife to support his family with, and to pay for his house.

There was evidence that the plaintiff's intestate consciously suffered after he was injured.

At the close of the evidence the judge, at the request of the defendant, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in March, 1900, and afterwards was submitted on briefs to all the justices.

*S. A. Fuller & G. W. Anderson*, for the plaintiff.

*C. F. Choate, Jr.*, for the defendant.

KNOWLTON, J. The principal questions in this case are, whether there was evidence of negligence on the part of the defendant or of any of its servants, and whether there was evidence of due care on the part of the plaintiff's intestate.

We think it plain that the tower man, whose duty it was to move the switch, was a person in "charge or control of . . . any switch" within the meaning of St. 1887, c. 270, § 1, cl. 3. Even if another person gave him directions or exercised supervision over him in such a way as to be in charge of the switch in a broad sense, so that the railroad company might be liable for his negligence in giving or failing to give proper directions, we are of opinion that, situated in the tower as he was, having complete manual control of the switch after receiving signals and orders from one below, his control and charge for the time were of a kind contemplated by the framers of the statute. There was testimony that Welch, the plaintiff's intestate, had a green light which was used to signal the tower man and the train men, and that the signal for track No. 1 was simply to hold it up. A witness testified that he saw Welch give the signal for track No. 1 to the tower man by holding up his lantern and shouting, "On one," and that he saw the tower man throw up his hand as a signal that he heard. Then, instead of setting the switch for track No. 1, the tower man switched the train on "three-house" track. The action of the tower man in throwing up his hand was an indication that he understood the signal that had been given him, and his further action in moving the switch

Digitized by Google

was equivalent to a representation that he had received the signal and understood it. The testimony of the witness tended to show that by the motion of his lantern Welch gave the recognized signal for track No. 1, and that he added a shout to the same effect. The jury might have found that the tower man was negligent in acting at all if he did not see and understand the signal, or in setting the switches wrongly if he did understand it. They might have found that the signal was given in such a way that it was negligence in him not to understand it correctly. His turning the switch in such a way as to send the train on the wrong track was the direct cause of the accident, and we are of opinion that there was evidence for the jury on this part of the plaintiff's case.

Although Welch was a switchman whose station was at the switches just southerly of the place where he was killed, we do not understand from the evidence that it was his duty to be all the time just at these switches, but only in such close proximity to them as to be able to receive and give signals, and to do the other duties connected with his position. There was a brakeman's house near by which was intended for his use, and we see nothing to indicate that there was any failure on his part to do his duty properly, or any lack of care up to the time that he came out of the brakeman's house and stepped upon the track where he was struck by the train. It does not appear that it was any part of his duty, when the tower man turned his switch, to examine the dwarf switch signals which stood a foot or a foot and a half above the ground to see if the tower man had turned the switch rightly. The evidence was that at the time of the accident these signals were so covered with snow and ice that it was very difficult, if not impossible, to read them. Of course, if at any time he saw a dwarf signal which showed that the tower man had made a mistake, he would endeavor to correct the mistake. A terrible snow storm was then raging, which some of the witnesses said was the worst of the season. We are of opinion that it was a question of fact for the jury whether, under the circumstances, it was his duty to go to the dwarf signals and clean off the snow and ice to see if the tower man had made a mistake. It seems that he was in the performance of his duty in walking away from the brakeman's house across and along the

Digitized by Google

tracks to a place where he could readily receive and give signals or do anything else that ought to be done while the cars were being put in their intended position, although he was not then going towards the switches. Unless he was negligent in not looking at the approaching cars and discovering that they were on the wrong track in time to escape them, there seems to be nothing to control the natural inference from his conduct that he was in the exercise of due care. If the train had been on the track where he had every reason to believe that it was coming, he could not have been injured. With the arrangement of cars on the other tracks as he had just seen them, it was impossible for the train to come on the track where he was walking while the train for which he had given the signal was being switched to track No. 1. He had every reason to suppose that he was in a place of perfect safety. Nothing but the failure of the tower man properly to execute the order which had just been given him could expose him to danger in the place where he was walking between "three-house" track and the cattle track. The jury might well find that a man in the exercise of ordinary care, who had just given a signal to a tower man to send back a train of cars on track No. 1, and who had received from the tower man a response in acknowledgment of the signal, and who knew that no other train could come upon the "three-house" track or the cattle track while the train was being switched upon track No. 1, would think it safe to walk between these two tracks in the belief that the train was being switched in accordance with the signal. In connection with the other facts, the inclemency of the weather was a circumstance of some importance. We think there was evidence of due care on the part of the plaintiff's intestate which should have been submitted to the jury.

Upon the question whether Welch was in the exercise of due care, we are of opinion that it was competent for the plaintiff to show that the train was coming much faster than the usual and ordinary rate of speed for cars which were being shifted at that place.

There was no error in the exclusion of the opinion of the witness as to how far Welch's voice could be heard in the storm. The witness was not an expert, and upon a full statement of the conditions the jury could judge whether Welch could have been heard by the tower man.

Digitized by Google

The judge might well hold that the notice given to the defendant to produce its written rules was insufficient to justify the introduction of secondary evidence.

Although it does not clearly appear how far, if at all, the plaintiff was dependent upon her son for support, there was evidence that for a long time he had given her all his wages, and there was testimony from which the jury might have found that she needed the money to obtain the necessaries of life, beyond that which her husband could furnish, and that she was dependent on this son for support within the meaning of the statute. See *McCarthy* v. *New England Order of Protection*, 153 Mass. 314; *Daly* v. *New Jersey Steel & Iron Co.* 155 Mass. 1, 5; *Houlihan* v. *Connecticut River Railroad*, 164 Mass. 555.

*Exceptions sustained.*

---

EDWARD MARTYN *vs.* NEW YORK AND BOSTON DESPATCH EXPRESS COMPANY.

SAME *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

GEORGE W. KNAPP *vs.* NEW YORK AND BOSTON DESPATCH EXPRESS COMPANY.

SAME *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 14, 1900. — June 20, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Personal Injuries — Due Care — Assumption of Risk.*

Persons who are struck when it is dark by a car on the track of a railroad company while they are engaged in a voluntary work for their own benefit, namely, that of carrying a tricycle that it might go earlier than in the regular course of transportation, they having disregarded the suggestion of the defendant's servant to take the tricycle by a safe way, and who, although they are honestly told that the tracks are clear, must have known that, as regards the chances of cars coming unexpectedly, they were acting at their own risk, are not in the exercise of due care.

FOUR ACTIONS OF TORT, for personal injuries. Trial in the Superior Court, before *Gaskill*, J., who, at the conclusion of



Digitized by Google

the evidence for the plaintiffs, at the request of the defendants, directed the jury to return verdicts in the four cases for the defendants; and the plaintiffs alleged exceptions, which appear in the opinion.

The case was argued at the bar in March, 1900, and afterwards was submitted on briefs to all the justices.

*I. R. Clark & S. D. Elmore*, for the plaintiffs.

*C. F. Choate, Jr. & R. F. Herrick*, for the defendants.

KNOWLTON, J. Each of the two plaintiffs has sued each of the two defendants to recover for an injury from being struck by a car on the track of the Old Colony Railroad Company, which was leased and used by the New York, New Haven, and Hartford Railroad Company. Adjacent to the tracks of the Old Colony Railroad Company, between them and South Street, at a distance of nearly four hundred feet from the southerly end of the passenger station in Boston, was a building occupied by the defendant express company under an arrangement with the railroad company. Along the northerly end of the building, occupying the whole space between the tracks on the east and South Street on the west, was a platform between four and five feet high, which ran northerly two hundred and eighty-five feet, covering nearly all of the triangular space, and about six and a half feet wide at the foot of the steps. Next easterly of this platform was track No. 1 of the railroad company, and easterly of that was a platform about a foot high, and easterly of that were tracks No. 2 and No. 3, and then another low platform. The offices of the express company were in the building at the southerly end of the high platform. On the evening of October 6, 1897, at about a quarter before seven o'clock, the plaintiffs went together to these offices with a tricycle weighing nearly two hundred pounds, five feet and two inches in width between the hubs of the hind wheels, five feet in length, and having wheels three feet and four inches high. This tricycle they wished to send by express to Brockton. After they had delivered it and paid the expressage, they were informed that the express matter and the sheet for the express car, which was to go to Brockton that night, had gone over to the car, which stood on track No 3, and that if they wished to have the tricycle go to Brockton that night they would be obliged to take it over

Digitized by Google

to the car themselves. They then asked how they could take it, and were told that they could take it up to the end of the platform and down the steps and across the tracks. The regular way used by the express company was through the building and over a plank crossing farther south. They asked about the trains, and were told it was all right, there were no trains going in or out; the track was clear. Accordingly they took the tricycle nearly to the end of the platform, and found that it was too wide to be wheeled down the steps. They then turned around and brought it to a point fifteen or twenty feet from the end of the platform, and Martyn went down the steps and came back along the track, while Knapp remained on the platform, and they lifted the tricycle part way down, where Martyn held it, while Knapp came down the steps and along the side of the platform to help him. While they were together there, engaged with the tricycle, a car, which was shunted back from an engine, came along and struck them. The space between the platform and the track was very narrow, and it was so dark that they could see an approaching car only a short distance. They gave no warning or information that they were upon the track. They knew that the tracks were a busy place where cars were passing back and forth to the station. They understood that the person who told them that the tracks were clear had no control over the movement of cars upon the tracks, and they must have known that in such a place cars besides the regular trains are frequently moved, of whose coming an employee of the express company would have no previous knowledge. They were engaged in a voluntary work for their own benefit, that the tricycle might go earlier than in the regular course of transportation; and, although they were honestly told that the tracks were clear, they must have known that, as regards the chance of cars coming unexpectedly, they were doing it at their own risk. If they had followed the suggestion of the defendants' servant, and taken the tricycle down the steps, they would have been in a safe place there, and would only have found it necessary to roll it across one track to a safe low platform, and then across two other tracks to the platform where the express car stood, and in going these short distances it would have been easy to avoid approaching cars. They could not properly understand

Digitized by Google

the statement of the express agent as an assurance that the tracks would remain clear for such a length of time as to enable them to get the tricycle carefully and safely down the side of the high platform and across the track by the method which they adopted. There was no planking or other indication between the rails near the steps, or elsewhere in the vicinity, to signify that the place was designed for pedestrians. The vehicle was heavy and unwieldy, and it was obvious, before they took their position on the track by the side of the platform, that they would be engaged there for a considerable time in getting it down and across the track, and that they would be unable to escape if a car should come. We are of opinion that, on the undisputed facts, there is no evidence that they were in the exercise of due care while exposing themselves in the manner described, and that verdicts for the defendants were rightly directed. In this view of the cases it is unnecessary to consider other questions which were argued. *Exceptions overruled.*

---

## FRAMINGHAM WATER COMPANY *vs.* OLD COLONY RAILROAD COMPANY.

## OLD COLONY RAILROAD COMPANY *vs.* FRAMINGHAM WATER COMPANY.

Suffolk. January 17, 1900. — June 21, 1900.

Present: MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Eminent Domain — Rights of Water Company and Railroad in Waters of Pond and River — Specific Performance — Injunction.*

The Framingham Water Company has no right under the St. of 1884, c. 271, incorporating it, and by the taking, as against the Old Colony Railroad Company, to all the waters of Farm Pond and Sudbury River within certain limits and to determine the question of necessity, but only has the right to so much of them as is necessary for the purposes specified in § 1 of the statute.

The Old Colony Railroad Company has the right to pump water from Farm Pond for the necessary use of its railroad, so far as that use does not interfere with the use of the same by the Framingham Water Company for supplying the town of Framingham with water under the St. of 1884, c. 271. Whether that company would have the right to use the water so as to interfere with the corporate purposes of the railroad company, *quære.*

Digitized by Google

Two bills in equity were brought, one by a water company against a railroad company for an injunction to restrain it from using any of the waters of a certain pond, and the other by the railroad company against the water company to compel it to specifically perform its agreement as to supplying the railroad company with water from the pond. In the first case this court decided that the railroad company had the right to pump water from the pond for its own use. In the second case the railroad company did not contend that if it had the right so to pump water it could maintain the bill for specific performance. *Held*, that there was no occasion, by the admission of the railroad company, to consider the matter of specific performance further.

Two bills in equity were brought, one by a water company against a railroad company for an injunction to restrain it from using any of the waters of a certain pond, and the other by the railroad company against the water company to compel it to specifically perform its agreement as to supplying the railroad company with water from the pond, and to restrain it from prosecuting two actions at law already brought against the railroad company, one to recover for all the water which the water company had furnished the railroad company from its pumping station, and the other alleging that the railroad company had taken water from the pond without its consent, claiming damages. *Held*, at the trial of the second bill in equity, that as to the two actions at law, the first depended upon whether the contract was made, and this could more properly be determined in the first action; that the second action at law would seem to be governed by what this court had decided in the first bill in equity as to the right of the railroad company to pump water from the pond for the necessary use of its railroad, and that an injunction should not issue to restrain the further prosecution of that action, if the water company should see fit to continue to go on with it.

THE FIRST CASE is a bill in equity by a water company, organized by the St. of 1884, c. 271, against a railroad company. The bill alleges that the plaintiff, by virtue of the authority given it by the St. of 1884, took, in the year 1885, in the manner prescribed in the act, the waters of Farm Pond, and the waters of so much of the Sudbury River in the town of Framingham as lie above the dam built across the river by the city of Boston in 1872, below the bridge on which the defendant's railroad crosses the river, and the waters flowing into Farm Pond and the Sudbury River above the dam, for its purposes as a water company, and has since been using the same for said purposes. The bill then charges the using and continuing to use by the defendant of the water of Farm Pond, without the consent of the plaintiff, to its great injury. The prayer of the bill is for an injunction to restrain the defendant from using any of the waters of Farm Pond and Sudbury River.

THE SECOND CASE is a bill in equity, filed February 3, 1892, alleging that in the spring of 1885 the defendant asked permission of the plaintiff to build a pumping station upon the land

Digitized by Google

of the plaintiff on Farm Pond, and agreed that if the plaintiff would do so it would pump and furnish to the plaintiff water at said station for the use of its engines and other necessary railroad purposes to the amount of 40,000 gallons a day, or so much thereof as might be necessary for said purposes from time to time; and, in consideration of such agreement, the plaintiff permitted the defendant to erect a pumping station upon its land; that the pumping station was erected and put in operation on July 4, 1885, and thereafter until August, 1887, the defendant performed its agreement, and has since refused to perform the same.

The bill further alleges that on December 14, 1891, the defendant brought an action in the Superior Court against the plaintiff to recover for all the water which it had furnished the plaintiff from said pumping station; and that on the same day the defendant brought an action in the same court alleging that the plaintiff had taken water from Farm Pond, without its consent, claiming treble damages therefor under its charter.

The bill further alleges that the failure of the defendant to furnish water would cause irreparable injury to the plaintiff, which was not capable of being compensated by money damages.

The material prayers of the bill are that the defendant be ordered specifically to perform its agreement; and that the defendant be restrained by injunction from prosecuting the actions already brought, or from prosecuting other actions.

The two cases were sent to a master, who made a report, and were afterwards heard by *Hammond*, J., who reserved them for the consideration of the full court. The facts appear in the opinion.

*R. M. Morse*, (*S. A. Phillips* with him,) for the Framingham Water Company.

*J. H. Benton, Jr.*, for the railroad company.

LATHROP, J. Before proceeding to consider the St. of 1884, c. 271, and the taking under it, it is necessary to consider previous legislation on the subject.

By the St. of 1872, c. 177, the city of Boston was authorized to take the waters of Sudbury River and Farm Pond, with certain provisions not material to these cases, except that § 4 pro-

Digitized by Google

vided that nothing contained in the act should be so construed as "to prevent the inhabitants of the towns of Framingham," and certain other towns named, "from taking from the Sudbury or Assabet Rivers or Farm Pond so much of the water hereby granted as shall be necessary for extinguishing fires, and for all ordinary domestic and household purposes, and for the generation of steam, or from cutting and carrying away ice from said pond; or as to prevent the Boston and Albany Railroad Company, or the Mansfield and Framingham Railroad Company, or the Boston, Clinton, and Fitchburg Railroad Company from taking water from Farm Pond, for use in locomotive or other engines, or for other railroad purposes, under such regulations of the city council of the city of Boston as may be essential for the preservation of the purity of the same." The city of Boston exercised the rights conferred upon it by this act, and the defendant in the first case is the successor of the rights and title of the Mansfield and Framingham Railroad Company and of the Boston, Clinton, and Fitchburg Railroad Company.

By the St. of 1881, c. 206, § 1, the town of Framingham was "authorized to supply itself and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other uses; to establish fountains and hydrants; to regulate their use, and relocate or discontinue the same, and to fix and collect rents for the use of said water." Section 2 provides: "Said town may take and hold of the waters of Farm Pond and Sudbury River in said Framingham, and the waters flowing into said Farm Pond and Sudbury River, so much as may be necessary for the purposes specified in section one of this act." By § 9, the act was to take effect upon its passage; but no expenditure was to be made, or liability incurred, except for preliminary surveys and estimates, unless the act should be accepted by a vote of two thirds of the legal voters of the town present and voting thereon at a legal meeting called for that purpose within three years from the passage of the act. We presume that this act was not accepted, for the master has found: "Under this law no action was taken by the town, except to convey all its rights under said chapter to the Framingham Water Company." This language seems to be inaccurate, for the conveyance was not authorized by the St. of 1881, but by the St. of 1884, c. 271,

Digitized by Google

§ 12, which incorporated the Framingham Water Company, the plaintiff in this suit.

By § 1 of this act certain persons named were made a corporation "for the purpose of furnishing the town of Framingham and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other purposes." Section 2 of this act provides: "Said corporation shall have all the rights which belong to the town of Framingham and the inhabitants thereof, or which have been granted to, or have been reserved by and to, the said town and inhabitants, to take, use and hold of the waters of Farm Pond and Sudbury River in said Framingham, and the waters flowing into said Farm Pond and Sudbury River, so much as may be necessary for the purposes specified in section one of this act." Power is also given by this section to take "all necessary lands for raising, diverting, flowing and holding said waters, and securing and preserving the purity of the same." By § 5, the capital stock shall not exceed $250,000.

Assuming to act under this statute, the plaintiff, by an instrument dated June 30, 1885, and recorded August 14 of the same year, took "for the sole use and benefit of the said Framingham Water Company all the waters of Farm Pond . . . and the waters of so much of Sudbury River in the said town of Framingham as lies above the dam built across said river by the city of Boston in 1872, below the bridge by which the Old Colony Railroad crosses said river, and the waters flowing into said Farm Pond and said Sudbury River above said dam."

The defendant had no actual notice of the taking until July, 1887.

The master has found many facts showing the condition of affairs at the time the various acts referred to were passed, and subsequently. So far as material they may be briefly stated as follows: Farm Pond is a great pond of 193 acres, and the defendant is a riparian owner on the pond. The defendant, as such owner, has always supplied itself, or been supplied, with water from the pond. If not absolutely necessary, it is in the highest degree important that the defendant should receive at or near there a very large daily supply of water for its engines and for the operation of its road. In 1887, the defendant built a pumping station on its own land, and pumped water for its

Digitized by Google

own use from Farm Pond, estimated at 50,000 gallons daily. The minimum daily supply of water from Farm Pond alone is between 500,000 and 600,000 gallons. The minimum daily supply from Sudbury River in Framingham and above the dam, which is below the railroad crossing, is 4,100,000 gallons, making 4,700,000 gallons daily from these two sources, and this would be adequate to supply a population of 47,000. The population of Framingham, by the census of 1890, was 9,239. The minimum daily supply of that part of Sudbury River within the town of Framingham and below the aforesaid dam is 6,000,000 gallons, thus making the total daily minimum supply of water within the town of Framingham of Farm Pond and Sudbury River, and waters flowing into them, to be 10,700,000 gallons, and this would be adequate to supply 100,000 people. The water furnished to and taken by the railroad company has not, in fact, up to 1896, interfered with or impeded the supply of water necessary for the purposes of the water company specified in the St. of 1884, c. 271, § 1.

The contention of the plaintiff in the first case is that by virtue of the statute incorporating it, and by the taking, it has the right as against the defendant to all the waters of Farm Pond and Sudbury River, within certain limits; that it alone has the right to determine the question of necessity; and that as the trespass is continuous, an injunction should issue restraining the defendant from taking any of the waters included in the taking by the plaintiff.

We are not able to accede to the proposition that the plaintiff has, by virtue of the act incorporating it, any such right as it claims. The act itself purports to give no such power. The purposes of the act were "for the purposes of furnishing the town of Framingham and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other purposes." St. 1884, c. 271, § 1. Section 2 does not give the right to take the waters of Farm Pond and Sudbury River, and the waters flowing into the same, but to take "of" these waters "so much as may be necessary for the purposes specified . . . in this act." The difference between the two is very great; and the reason of the difference is manifest when we consider the previous legislation which we have already referred to. When

Digitized by Google

the grant was made to Boston by the St. of 1872, it was of "all the water of Sudbury River," and "the water of Farm Pond, . . . and the waters which may flow into and from said river and pond." At the same time, as we have seen, the rights of Framingham and other towns to take water for domestic purposes were preserved, as were the rights of the railroad companies to take water from Farm Pond, for use in locomotives or other engines, or for other railroad purposes. When, therefore, the right was given to the town of Framingham, and, when it did not accept the act, to the water company, to take of the waters so much as was necessary for specified purposes, it would do great violence to the language used to say that power was given to the water company to take all of the waters.

The view which we take of the language of the act is supported by all the attendant circumstances. The minimum daily supply of water within the town of Framingham of Farm Pond and Sudbury River and waters flowing into them is found to be 10,700,000 gallons, which would be adequate to supply 100,000 people. According to the State census of 1885, Framingham had a population of 8,275, and the master has found that by the census of 1890 the population was 9,239. If the plaintiff's contention is correct, it could take all these waters for the small town of Framingham, cut off an important water supply of the city of Boston and of the various railroad companies bordering on the pond, and compel them to buy water of the plaintiff, a corporation with a capital stock not to exceed $250,000, and with authority to issue bonds to an amount equal to the capital stock actually paid in. Supposing the whole amount to be $500,000, what provision would this be for building the works, laying the pipes, and paying damages to the city of Boston and the railroad companies?

The plaintiff had a more modest view of its powers under the St. of 1884, when on October 30, 1885, it entered into a contract with the city of Boston, by which the city agreed to allow the plaintiff to take of the waters of Farm Pond and Sudbury River, and the tributaries of both, so much as may be needed for its purposes in accordance with the St. of 1884, c. 271, and the water company agreed to pay the city on the first day of January of each year, for the annual daily average quantity of

Digitized by Google

water taken by the company during the preceding year, at the rate of $700 per million gallons. The contract further provided: "Whenever the annual daily quantity of water taken by said water company shall exceed one million gallons, the said water company shall pay the said city for such average excess at the rate of $2,500 per million gallons in addition to the payment above provided for." The contract was to be terminable by either party upon written notice to the other of one year.

This contract was made soon after the taking, and the water company appears as a buyer of water and not as a seller. By its conduct it admits that its rights are subordinate to those of the city.

The finding of the master, that "the water furnished to and taken by the railroad company has not in fact, up to 1896, interfered with or impeded the supply of water necessary for the purposes of the water company specified in the St. of 1884, c. 271, § 1," can only be met by the contention that the water company was the sole judge of the necessity. But this position is untenable. If a corporation is given the right to take either land or water by the right of eminent domain, it can take only what is reasonably necessary for the purpose. It does not usually acquire the fee, but only such easement as is necessary for the purposes for which it is permitted to take it. *Harback* v. *Boston*, 10 Cush. 295. *Attorney General* v. *Jamaica Pond Aqueduct*, 133 Mass. 361, 365. *Bishop* v. *North Adams Fire District*, 167 Mass. 364. *Rockport* v. *Webster*, 174 Mass. 385. See also *In re St. Paul & Northern Pacific Railway*, 34 Minn. 227; *Tracy* v. *Elizabethtown, Lexington, & Big Sandy Railroad*, 80 Ky. 259; *State* v. *Morris Aqueduct*, 17 Vroom, 495; *Rensselaer & Saratoga Railroad* v. *Davis*, 43 N. Y. 137; *Spring Valley Water Works* v. *San Mateo Water Works*, 64 Cal. 123.

On the whole case we are of opinion that the defendant has the right to use the water of the pond for the necessary use of its railroad, so far as that use does not interfere with the use of the same by the water company for supplying the town of Framingham with pure water; and that such use by the defendant does not interfere with the plaintiff's right to use the water for the purposes stated in its charter. Whether the defendant would have the right to use the water so as to interfere with the

Digitized by Google

corporate purposes of the plaintiff, it is unnecessary now to consider.

In the first case the order must be *Bill dismissed.*

In the second case, it appears from the report of the master that in April, 1885, before any water rights or land had been taken by the water company under the statute, the water company began the construction of a pumping station upon a piece of land belonging to the railroad company, and located between the pond and the railroad tracks. This station was begun in April, 1885, and completed July 4, 1885. Before the work was begun, there was a conference between the engineer of the water company and the general manager of the railroad company, and it was understood by the latter that the water company was to furnish 40,000 gallons a day for the privilege of building the pumping station on the railroad company's land. On August 14, 1885, the water company took the land by the right of eminent domain, and this taking was held to be valid in *Old Colony Railroad* v. *Framingham Water Co.* 153 Mass. 561. The master found that there was no completed contract that 40,000 gallons a day should be furnished without charge, and reported all the evidence bearing upon this question.

We do not find it necessary to consider this question, as the railroad company does not contend that if it has the right to pump water for its use from the pond it can maintain this bill against the water company to enforce specific performance of the contract by the water company to furnish water. As we have decided in the first case that the railroad company has the right to pump water from the pond for its own use, there is no occasion, by the admission of the plaintiff, to consider the matter of specific performance further.

As to the two actions at law, the first depends upon whether the contract was made, and this can more properly be determined in the first action. The second action at law would seem to be governed by what we have decided in the first case. We do not think, however, that an injunction should issue to restrain the further prosecution of that action, if the water company should see fit to continue to go on with it. Standing alone, no ground for equitable relief is shown.

*Bill dismissed.*

Digitized by Google

## LAURANIA RICHARDSON *vs.* INHABITANTS OF DANVERS.

Essex. March 7, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Personal Injuries — Bicycle — Highway.*

A bicycle is not a carriage within the meaning of that term in the Pub. Sts. c. 52, § 1.

TORT, for personal injuries occasioned to the plaintiff while riding on Maple Street, a highway in the defendant town. Trial in the Superior Court, before *Richardson*, J., who refused to rule, as requested by the defendant, that a bicycle was not a carriage within the meaning of that term in the Pub. Sts. c. 52, § 1; and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

*D. N. Crowley*, for the defendant.

*H. P. Moulton*, for the plaintiff.

LATHROP, J. The plaintiff, while riding a bicycle on a highway which the defendant was bound to keep in repair, encountered a depression in the way, and fell from her wheel and was injured. The jury returned a verdict in her favor, and the case comes before us on several exceptions to the exclusion of evidence, and to the refusal of the court to rule that a bicycle is not a carriage within the meaning of the Pub. Sts. c. 52, § 1.

The statute in question provides that highways and other ways named shall be kept in repair, at the expense of the town, city, or place where they are situated, "so that the same may be reasonably safe and convenient for travellers, with their horses, teams, and carriages at all seasons of the year." This statute was enacted in 1786, and has been in force ever since. St. 1786, c. 81, § 1. Rev. Sts. c. 25, § 1. Gen. Sts. c. 44, § 1. St. 1877, c. 234.

The question then is whether a bicycle is a carriage within the meaning of this term in the statute.

We have no doubt that for many purposes a bicycle may be

Digitized by Google

considered a vehicle or a carriage. It may be lawfully used on the highway, and is subject to the law of the road. *State* v. *Collins*, 16 R. I. 371. *Myers* v. *Hinds*, 110 Mich. 300. *Taylor* v. *Union Traction Co.* 184 Penn. St. 465. *Thompson* v. *Dodge*, 58 Minn. 555. So, under a law prohibiting a person from riding or driving any sort of carriage furiously. *Taylor* v. *Goodwin*, 4 Q. B. D. 228. So, under laws or ordinances prohibiting driving on the sidewalk. *Regina* v. *Justin*, 24 Ont. 327. *Mercer* v. *Corbin*, 117 Ind. 450. *Commonwealth* v. *Forrest*, 170 Penn. St. 40. Under a law permitting the collection of tolls on a turnpike a bicycle was held to be a carriage. *Geiger* v. *Perkiomen & Reading Turnpike Road*, 167 Penn. St. 582. The opposite was held in *Williams* v. *Ellis*, 5 Q. B. D. 175, and in *Murfin* v. *Detroit & Erin Plank-Road Co.* 113 Mich. 675. And in Scotland, in an action on a policy of insurance, it was held that a person riding a bicycle was not "'travelling as an ordinary passenger' in a vehicle." *M'Millan* v. *Sun Life Assurance Co.* 4 Scots L. T. 98.

The statute in question was passed long before bicycles were invented, but, although of course it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles *ejusdem generis*, and that it does not extend to bicycles. This view is favored by the provision in the Pub. Sts. c. 52, § 18, which provides that no damage shall be recovered "by any person whose carriage and the load thereon shall exceed the weight of six tons." The words last quoted were first added by the St. of 1838, c. 104. It seems to us that the Legislature by the use of the word "carriage" had in view a vehicle which could carry passengers or inanimate matter, not to exceed with its load more than six tons.

As was said in *State* v. *Missouri Pacific Railway*, 71 Mo. App. 385, 393, "While the terms in question are flexible and may include the new uses, falling within the legitimate scope of their meaning, which arise in the growth of society, we are not warranted in giving them a new meaning so as to cover different subjects not within the principle upon which they are founded. To do this would be judicial legislation."

A bicycle is more properly a machine than a carriage; and so it is defined in Murray's dictionary. It is also so considered in the St. of 1894, c. 479, which is an act to regulate the use of bicycles

Digitized by Google

and similar vehicles, and in the amendatory act of 1898. St. 1898, c. 121. In each of these acts it is called a machine.

A bicycle is of but little use in wet weather or on frozen ground. Its great value consists in the pneumatic tire; but this is easily punctured, and no one who uses a wheel thinks of taking a ride of any distance without having his kit of tools with him. A hard rut, a sharp stone, a bit of coal or glass, or a tack in the road may cause the tire to be punctured, and this may cause the rider to fall and sustain an injury. It may impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety.

It is because ordinary roads are not considered suitable for bicycles that cities and towns are given the power by the St. of 1898, c. 351, to lay out, construct, and maintain paths for bicycles. And the St. of 1899, c. 474, makes it a misdemeanor to trespass upon a cycle path by driving thereon with a horse or other animal, except to cross the same.

We are, therefore, of opinion that a bicycle is not a carriage within the meaning of that term in the Pub. Sts. c. 52, § 1. This view of the case renders it unnecessary to consider the other exceptions. *Exceptions sustained.*

---

## CELLULOID COMPANY *vs.* ALFRED E. HAINES.

Suffolk. March 8, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Continuing Guaranty.*

On April 29 the plaintiff corporation wrote to the defendant, who was the treasurer of the D. Co., "If he [the defendant] will give us his written guarantee to pay bills of one month upon the 15th of succeeding month, if not already paid by the company [D. Co.], we will accept it and extend credit to extent of $200." On May 1 the defendant answered, "As you have requested me to have me guarantee the payment of the D. Co.'s account by the middle of the month, I hereby agree to pay the current month's account of the D. Co. on the 15th of the following month, if not paid by them before." Several months later the plaintiff corporation having notified the defendant that the D. Co. had not responded, and

Digitized by Google

having called upon the defendant to make good his guaranty, he did not deny, but in substance admitted, his liability. *Held*, that the guaranty was a continuing one.

CONTRACT, to recover for goods sold and delivered by the plaintiff to the William J. Dinsmore Company, of which the defendant was treasurer, upon the defendant's alleged guaranty of payment therefor. At the trial in the Superior Court, before *Hopkins*, J., the defendant asked the following rulings: 1. The letter of May 1, 1896, alleged to have been written by the defendant to the plaintiff, is not a continuing guarantee. 2. The said letter is a guarantee only for goods sold by the plaintiff to the W. J. Dinsmore Company during the month of May, 1896. 3. The said letter of May 1, 1896, providing no goods were sold by the plaintiff to the Dinsmore Company in May, is a guarantee only for the bill sold by the said plaintiff to the said Dinsmore Company during the first month following May 1, during which goods were sold. The judge refused so to rule.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion and in a note by the reporter.

*H. J. Jaquith*, for the defendant.

*J. E. Abbott*, for the plaintiff.

MORTON, J. The question is whether the guaranty contained in the defendant's letter of May 1 was a continuing guaranty, or was a guaranty for the month of May; for we do not see how it can be fairly construed as a guaranty for the month of May or for the first month following May that goods were sold to Dinsmore and Company. If that had been what was intended, language more apt for the purpose naturally would have been used.

The letter of May 1 was written in reply to a letter from the plaintiff dated April 29, and we think that the letter of April 29 was properly admitted as the letter to which that of May 1 was a reply, and as tending to throw light on the matter to which that related, and to aid in its construction. Looking at the letter of April 29, it is clear that what the plaintiff wished to obtain was a continuing guaranty, and must have been so understood by the defendant. They write, "If he [the defendant] will give us his written guarantee to pay bills of one month upon the 15th of succeeding month, if not already paid by the com-

Digitized by Google

pany, we will accept it and extend credit to the extent of $200." This refers to the bills of succeeding months, and clearly implies that the guaranty is to be a continuing one. In reply to that letter the defendant writes as follows: "As you have requested me to have me guarantee the payment of the Wm. J. Dinsmore Co.'s account by the middle of the month, I hereby agree to pay the current month's account of the Wm. J. Dinsmore Co. on the 15th of the following month, if not paid by them before." It is plain, it seems to us, that the defendant meant by this to accede to the request of the plaintiff, and to guarantee by the middle of each month, that is, by the 15th, the payment of the bills of the preceding month, and that he did not use the phrase "current month's account" as meaning the account of the month then current, but as meaning the account that would accrue from month to month. This construction is supported by the fact that when several months later the plaintiff notified him that the Wm. J. Dinsmore Company had not responded to their requests for a settlement and called upon him to make good his guaranty, he did not deny, but in substance admitted, his liability.* See *Lee* v. *Butler*, 167 Mass. 426.

We think, therefore, that the guaranty must be construed as a continuing guaranty, and that the rulings requested were rightly refused. See *Sullivan* v. *Arcand*, 165 Mass. 364; *Dover Stamping Co.* v. *Noyes*, 151 Mass. 342. *Exceptions overruled.*

* This was by letter, dated September 29, 1896, which was as follows: "Your favor of the 28th inst. duly received and noted. Would say in answer that I have requested the Dinsmore Co. to remit you the first moneys that come in. If they fail to pay up in the next few days drop me a line and I will look after them, but I do not care to send you a check on my own account, until I give them a chance to straighten it out themselves."



Digitized by Google

## EMMA J. MOORE *vs.* WILDEY CASUALTY COMPANY

Barnstable. March 9, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Accident and Life Insurance Policy — Notice — Time Limit — Waiver — Injury justifying Recovery under Policy.*

In this case, which was an action by a widow against a life insurance company to recover a certain sum of money according to the terms of the policy issued by the defendant on the life of her husband, there was evidence of a waiver on the part of the defendant of the time limit in regard to the notice of the death of the insured, and the question was rightly submitted to the jury; and the words "such injuries alone," in the clause in which the company agrees to pay the widow "if living . . . the sum of $5,000, if the death of the certificate holder shall result from such injuries alone within ninety days from the date of said accident," refer to the kind of injury which furnishes the basis of indemnity, namely, bodily injury effected during the life of the certificate "through external, violent, and accidental means."

CONTRACT, by the widow of William M. Moore, to recover the sum of $5,000, by the terms of a certificate or policy of insurance issued by the defendant company to Moore, and providing for the payment of the above named sum to the plaintiff as beneficiary named therein in case of the death of Moore by such accident and under such terms and conditions as in said certificate or policy were fully set forth.

The conditions of the certificate or policy material to the determination of the questions involved are as follows:

1. Upon the question of notice the following conditions are set out upon the back of said certificate or policy.

"Fifth. Written notice shall be given the said company at Boston, Mass., within ten days of the date of the accident and injury, for which claim of indemnity or benefit is made, with full particulars thereof, including a statement of the time, place and cause of the accident, the nature of the injury and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the company.

"Sixth. This certificate will not entitle the beneficiary herein

Digitized by Google

named or any party in interest to death benefits unless death results from the accident within ninety days from the date of the accident, of which accident the company shall have had notice within the ten days mentioned of the happening thereof. . . .

"Fourteenth. The provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the insurance hereof and to its validity and enforcement, and no waiver shall be claimed by reason of the acts of any person, unless such acts shall be specially authorized in writing over the signature of the secretary of this company."

2. Upon the question of the character of the injuries for which indemnity was payable under the terms and conditions of the certificate, the following are the material portions of said certificate as set forth in the body thereof.

"1. The sum of $25 per week for a period not exceeding fifty-two consecutive weeks as indemnity for loss of time resulting from bodily injury so effected during the life of this certificate through external, violent and accidental means which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated.

"2. Or, if such injury alone shall not cause total disability as described in Provision one (1), but shall immediately and continuously disable and prevent the insured from performing one or more important duty or duties pertaining to his occupation, the company will pay him, during continuance of such disability for not exceeding sixteen consecutive weeks an amount to be determined by the company, based upon the nature and severity of the injuries and consequent effects upon the occupation of the insured, the maximum of such amount not to exceed fifty per cent of the sum named in Provision one (1), and the minimum not less than ten per cent of such sum. . . .

"5. And the said company agree to pay to Emma J. Moore, wife, if living, if not, to the executors or administrators of said member, in trust, however, for and to be forthwith paid over to his heirs at law the sum of $5,000, if the death of the certificate holder shall result from such injuries alone within ninety days from the date of said accident."

Digitized by Google

At the trial in the Superior Court, before *Sheldon*, J., the defendant requested a ruling that, upon the evidence, proper written notice of the accident of March 31, 1898, was not given to the defendant within the time limited by the certificate or policy, and that the defendant had not waived such notice, and therefore the plaintiff cannot recover.

The judge declined so to rule, and instructed the jury that proper notice was not given to the defendant, but that there was evidence upon which they might find as a question of fact whether or not said requirement was waived by the defendant.

The defendant also requested the judge to give the jury the following instruction: "If you find that the accident of March 31, 1898, did not, independently of all other causes, immediately and wholly disable said William M. Moore from transacting any and every kind of business pertaining to his occupation, or immediately and continuously disable and prevent him from performing one or more important duty or duties pertaining to his occupation, then it was not such injury as would entitle the plaintiff to recover under the certificate in suit, and you must bring in your verdict for the defendant." The judge refused so to rule; the jury found for the plaintiff, and the defendant alleged exceptions. The facts appear in the opinion.

*F. M. Forbush*, for the defendant.

*H. P. Harriman & H. E. Perkins*, for the plaintiff.

MORTON, J. This case comes here upon the defendant's exceptions to the refusal of the court to give two rulings that were asked for. The first was that upon the evidence proper written notice of the accident was not given within the time limited by the certificate and that the defendant had not waived such notice, and the plaintiff could not, therefore, recover. The court refused to give this ruling, and ruled that proper written notice had not been given, but that there was evidence for the jury on the question whether the defendant had waived the requirement as to notice, — meaning, of course, the requirement as to the time within which notice should be given. We think that this was correct. The accident occurred on March 31, 1898. There was evidence tending to show that a brief notice of the accident, dated March 31, was sent by the plaintiff's husband to the defendant company, but was not received till April 11. There was

Digitized by Google

also evidence tending to show that another notice, dated April 9, and giving full particulars of the accident, was sent by the plaintiff's husband to the company, but that this likewise was not received till April 11. No objection was then made by the company that these notices were not within the time required by the certificate. That fact would not of itself, perhaps, constitute sufficient evidence of waiver. But on April 23 the defendant's secretary sent to the plaintiff an accident blank, saying that she could fill it out and forward it to that office at her earliest convenience, if she so desired. A blank containing full particulars of the accident and signed by the plaintiff's husband, and dated April 26, was received by the defendant, and has been retained by it without objection, so far as appears. Presumably this was the blank referred to in the letter of the defendant's secretary of April 23. After the death of the plaintiff's husband, on June 10, 1898, a certificate was filled out by her and sent to the defendant company. The receipt of this was acknowledged by the defendant through its secretary by letter dated July 8, in which he writes: "We have received the proper form of certificate filled out by Mrs. Moore in the case of the late Dr. Wm. M. Moore and will say that Mr. Kelley a brother-in-law of the widow, has been in to see in regard to the latter, desiring us to keep him posted." No objection appears to have been made at this time that notice of the accident had not been received within the ten days required by the certificate. The first objection made by the defendant was on October 10, 1898, in reply to a letter from the plaintiff's counsel, and the objection then was the general one, that the estate of the plaintiff's husband had no claim against the company. When the objection that notice of the accident had not been received within the time required was first made, does not appear. It is said in the brief of counsel for the plaintiff that it was not made till after suit was brought, which, as appears from a copy of the writ, was October 12, 1898. We think that the conduct of the defendant was such as to warrant the jury in finding that there was a waiver of the requirement in regard to the time within which notice should be given, and that the refusal to rule as the defendant requested was right. See *Searle* v. *Dwelling House Ins. Co.* 152 Mass. 263; *Clark* v. *New England Ins. Co.* 6 Cush. 342; *Peabody* v. *Fraternal Accident Association*, 89 Maine, 96.

Digitized by Google

The other ruling requested relates to the construction to be given to the words "such injuries alone" in the clause in which the "company agree to pay Susan J. Moore, wife, if living, . . . the sum of $5,000, if the death of the certificate holder shall result from such injuries alone within ninety days from the date of said accident." We think that it is plain that they refer to the kind of injury which furnishes the basis of indemnity, namely, bodily injury effected during the life of the certificate "through external, violent, and accidental means." That is the sense in which like words are used in the clause relating to partial disability, and that is the kind of injury which is the basis of indemnity in cases of total disability. We see no reason for holding that a different kind of injury was meant in cases of death. The certificate defines the kind of injury which shall constitute the basis of indemnity, and then provides for cases of partial disability, total disability and death as the result of such injuries. No doubt the company could have provided that the injury which should entitle a party to indemnity in case of death should be such as resulted in total or partial disability for a longer or shorter time, as well as death within a certain time, but we do not think that it has done so in the certificate before us. We think that the ruling requested was rightly refused.

*Exceptions overruled.*

---

MARY A. MURPHY, administratrix, *vs.* INHABITANTS OF NEEDHAM.

Norfolk. March 13, 14, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & BARKER, JJ.

*Personal Injuries — Employers' Liability Act — Liability of Town to Employee injured in Public Work under Public Officer — Evidence.*

It is a defence to an action against a town, under the employers' liability act, St. 1887, c. 270, for the conscious suffering and death of the plaintiff's intestate, that the work in which the intestate was engaged was a public one under the direction of the superintendent of streets, who was a public officer engaged in the performance of a public duty; and the circumstances of this case do not justify

Digitized by Google

the plaintiff's contention that the superintendent was engaged as a servant of the town in matters relating to its private benefit and not to its public duty.

If, in an action against a town for personal injuries, the subject of inquiry is the nature of the duty or service in which the superintendent of streets was engaged at the time of the accident, questions which have no tendency, or at least a very remote one, to throw light on that matter, are rightly excluded.

TORT, under the employers' liability act, St. 1887, c. 270, for the conscious suffering and death of the plaintiff's intestate. Trial in the Superior Court, before *Gaskill*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion and in a note by the reporter.

*F. M. Forbush*, for the plaintiff.

*T. E. Grover*, for the defendant.

MORTON, J. As we understand the bill of exceptions, the gravel taken from the pit at the time when the plaintiff's intestate received the injuries which caused his death was used in making ordinary repairs upon Hingham Avenue, a public highway in the defendant town. We also understand that the plaintiff's intestate was engaged in getting out this gravel, and that he was doing it under the direction of the superintendent of streets of the defendant town. It is clear that the superintendent of streets was a public officer. St. 1893, c. 423, §§ 25, 26.

We do not see why, therefore, if there was any negligence on his part, it was not, as the defendant contends, that of a public officer engaged in the performance of a public duty. *Clark* v. *Easton*, 146 Mass. 43. *Pratt* v. *Weymouth*, 147 Mass. 245. *Taggart* v. *Fall River*, 170 Mass. 325. *Mahoney* v. *Boston*, 171 Mass. 427. *Collins* v. *Greenfield*, 172 Mass. 78.

The plaintiff seeks to avoid the effect of the rule thus invoked by attempting to show that the superintendent was engaged as a servant of the town in matters relating to its private benefit and not to its public duty. To do this she relies on the following circumstances. The accident occurred October 7, 1898. There were at the time, in the pit where it occurred, piles of stones, part of which came from that pit and part from other pits. This stone was crushed immediately after the accident for the use of the town. But in November or December following, some of it was used on the line of a street railway located on a highway called Great Plain Avenue, and

Digitized by Google

the town received from the railway company $325 in cash for such stone. In November, one Mary J. Stone paid the town $14 for a sidewalk constructed for her at about that time; but the gravel used in its construction came from another pit. Also in November another street railway company paid the town $25.50 for repairs made in the May or June previous upon a highway called Central Avenue.

But these circumstances did not show, and had no tendency to show, that the work in which the superintendent was engaged at the time of the accident to the plaintiff's intestate was not the performance of a public duty. As already observed, the gravel which the plaintiff's intestate was getting out was used in making ordinary repairs upon one of the public highways of the town, and there is nothing to show that it had been arranged or was in contemplation that stone should be crushed for use on the line of the street railway company or for any other private use. On the contrary, it is stated that the stone that was in the pit was crushed for the use of the town, meaning, as we understand it, for its public use. The fact that several months before the town had made repairs for a street railway company on a highway for which it was paid in November, had no tendency to show that the work in which the superintendent was engaged at the time of the accident was being done by him in his capacity as an agent of the town rather than as a public officer. Nor did the fact that the town several weeks after used some of the crushed stone on the line of another street railway have any such tendency. The work in which the superintendent was engaged being done by him as a public officer, whatever orders or directions he may have given at the time of the accident are to be regarded as given in that capacity, and not as given in some other capacity, which there is no evidence that he was undertaking to fill.

The questions put to Wright and Henderson were properly excluded.* The subject of inquiry was the nature of the duty

* Wright was asked, in direct examination by the plaintiff's counsel, whether or not, at about the time following the accident when the material from the falling bank had been sorted out, he worked on the stone heap? Also what the gravel was used for which was taken from the pit? And whether or not during that period gravel from the pit was used upon the

Digitized by Google

or service in which the superintendent was engaged at the time of the accident, and the excluded questions had no tendency, or if they had any tendency it was a very remote one, to throw light on that matter. What use was made of other gravel taken from the pit was immaterial. *Exceptions overruled.*

OSCAR E. A. WIESSNER *vs.* MARCELLUS S. AYER & another.

Suffolk. March 13, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & BARKER, JJ.

*Statute of Frauds — Modification of Written Offer by Telephone — Acceptance — Parol Agreement — Substituted Performance.*

If B. amends his written offer to A. by telephone, the acceptance of the amended offer does not make a contract good against the statute of frauds, because one essential term of the agreement to be performed is not stated otherwise than by parol; and A. cannot recover on the written offer, because he has not accepted it; nor can he recover upon the amended offer, because no sufficient memorandum of its terms has been signed by B.; and the doctrine of substituted performance has no application, because no contract, good under the statute, has been entered into.

CONTRACT for the breach of an alleged agreement between the plaintiff and the defendants, copartners under the firm name of M. S. Ayer and Company, by which the defendants were to lease of the plaintiff the basement and the first, fifth, and sixth floors of a building in Boston for a term of years. The answer set up the statute of frauds. At the trial in the Superior Court, before *Bishop*, J., it appeared that M. S. Ayer, one of the defendants, applied to one Redding, a real estate agent in Boston, employed by the plaintiff, who resided in New York, to lease the premises, and presented to him an offer in writing, as follows:

"Boston, Dec. 21, 1897. Ralph W. Redding, Esq., 7 Water

sidewalks? Henderson was asked, in cross-examination by the plaintiff's counsel: "What has been the custom of the town during your administration as superintendent of streets as to the construction of sidewalks; as to whether a part or the whole of the expense of the construction of sidewalks was charged to abutters?"

Digitized by Google

St., Room 407, Boston: In reply to your request for an offer in writing for the rent of a portion of the new brick building, corner Portland & Travers Sts., will say, we will give for the cellar, first floor, fifth floor, sixth floor, on a lease of ten five years (10) (5) — providing a few slight changes such as have been mentioned are made — Six thousand five hundred dollars, $6,500 — per year, payable quarterly. The above offer includes heating each floor in a satisfactory manner and also use of the elevator free of extra charge: rent to commence the first of Mch 1898 and we can commence at once to put premises in shape for occupancy and occupy same when ready. M. S. Ayer & Co.

"P. S. We to have the top of the building for our signs exclusively, also the lower part occupied by us. M. S. Ayer & Co."

"Dec. 22–97. Our offer now is as above only on a lease of five years, four of which is at the rate of sixty-five hundred per year & one year at seven thousand per year. M. S. Ayer & Co."

Redding, called by the plaintiff, testified that, one or two days after the receipt of this offer, he had a conversation with M. S. Ayer by telephone, and told him "that the plaintiff was willing to accept his offer, only that he wanted the rent payable monthly, in advance, instead of quarterly as his offer mentioned"; and that Ayer said "he had never paid rent that way, and would not do it even if that was the New York custom"; that "finally, after considerable conversation, Mr. Ayer said that, by way of compromise, he would make it the 15th of each month, and explained himself by saying that the first payment should be on the 15th of March for the month of March, and each month following, in the middle of the month"; that the witness told him that he would communicate with the plaintiff and find out if he accepted the compromise, and then left Ayer at the telephone; that the witness next saw Ayer in regard to the transaction on December 27, at the office of the witness; that Ayer entered the office about four o'clock in the afternoon, and asked the witness if he had heard from the plaintiff; that the witness said, "Yes. Your offer is accepted. I was going to write you; I will do so to-night"; that the witness wrote and mailed the following letter the same night, which it was admitted the defendants received:

"Boston, December 27, 1897. Messrs. M. S. Ayer & Co., 209

Digitized by Google

& 211 State Street, Boston. Gentlemen: Your offer of December 21st, 1897, with supplementary amendment of December 22d, 1897, and amendment by telephone message of December 24th, 1897, whereby the rent shall be paid in semi-advance monthly instalments, the first payment to be made March 15th, 1898, all in reference to taking a lease of a portion of a building situate on the southeast corner of Portland and Travers Streets, Boston, Mass., is hereby accepted. I wish to have our verbal agreement, which you desired should be separate from the lease, wherein you are to supply the labor for running the heating plant, and oiling the elevator guides and motor, understood. Yours, Ralph W. Redding, Agent for Oscar E. A. Wiessner."

M. S. Ayer, called by the defendants, testified that in the talk over the telephone Redding tried to get him to agree to pay the rent in advance, or in the middle of the month, but that he refused to do so, and told Redding that he had never paid rent in advance in all his business life and was not going to begin then, and told Redding to submit the proposition as it stood, meaning the written proposition to the plaintiff, and, if possible, get an answer by telegraph; that on the 27th when he (Ayer) called upon Redding he asked, "Have you heard from New York?" that Redding said he had, and said, "Your proposition is accepted," to which he replied, "I am glad of it," and told him to send the lease at once for execution, and turned to go out, when Redding followed him out of the door and told him, "In my offer I said to Mr. Wiessner that you would do the firing and take care of the elevator; it will only require a little time"; and that he (Ayer) said, "Who authorized you to say so? Did I make an offer of that kind, that you should inject into my offer, or our offer, that we should run the elevator, take care of the elevator, do the firing or anything of that kind? I will say to you I never made any offer of that kind. I will now withdraw my offer for the building; I will not have anything more to do with the building, or any other building that you have anything to do with."

The defendants asked the court to rule that the plaintiff could not maintain the action upon the foregoing evidence.

The judge ruled that if the transaction took place as described by Redding, it constituted the acceptance of a proposition partly

Digitized by Google

in writing and partly oral; if it took place as stated by Ayer, it was the acceptance of a proposition not made by him in full, and that in either case there was no sufficient memorandum in writing of the contract sued upon to bind the defendants under the statute of frauds, and directed a verdict for the defendants; and the plaintiff alleged exceptions.

*W. Schofield & R. G. McClung*, for the plaintiff.

*E. R. Anderson*, for the defendants.

BARKER, J. The action is for breach of an alleged agreement of the defendants to take a lease from the plaintiff of certain parts of a building for a term of five years. The verdict for defendants was ordered upon the ground that the evidence would not justify a finding that there was sufficient memorandum signed by the defendants, the statute of frauds having been pleaded.

It was conceded that there had been a written offer, and the plaintiff contended that this offer had been amended by the defendants by telephone.

The written offer was to take the premises for five years at a rent payable quarterly. The plaintiff did not contend that this offer had been accepted. His contention was that before acceptance the offer had been so amended by telephone that the rent should be "paid in semi-advance monthly instalments." His own acceptance was not of the written offer. There is no dispute that the words "Yes. Your offer is accepted," spoken by the plaintiff's agent to the defendants on December 27, and the letter written later upon the same day, did not refer to the written offer as it was made.

This being so, it follows that the written offer was never accepted, either by parol or in writing. If the defendants did amend their offer by telephone, the acceptance of the amended offer did not make a contract good against the statute of frauds, because one essential term of the agreement to be performed was not stated otherwise than by parol. The plaintiff could not recover on the written offer, because he had not accepted it. He could not recover upon the amended offer, because no sufficient memorandum of its terms had been signed by the defendants.

The doctrine of substituted performance for which the plaintiff contends, citing *Cummings* v. *Arnold*, 3 Met. 486, and the cases in which it has been followed, has no application, because no

Digitized by Google

contract, good under the statute, has been entered into. See also *Stearns* v. *Hall*, 9 Cush. 31; *Lerned* v. *Wannemacher*, 9 Allen, 412, 419; *Whittier* v. *Dana*, 10 Allen, 326; *Hastings* v. *Lovejoy*, 140 Mass. 261, 264; *King* v. *Faist*, 161 Mass. 449.

*Exceptions overruled.*

---

FRANK STINSON *vs.* CHARLES KENNY & another.

Suffolk. March 15, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Personal Injuries — Collision of Carriage and Bicycle — Negligence — Due Care — Instructions.*

At the trial of an action for personal injuries, there was testimony tending to show that the plaintiff came down C. Street on the right hand side towards W. Street, and that he was riding slowly and ringing the bell of his bicycle, and that before crossing W. Street he looked northerly and saw the hack driven by the defendant's servant, and "tried to make a sharp turn to get out of the way of the carriage, but he (meaning evidently the driver) made a turn quickly, then the pole caught me and knocked me off my bicycle and threw me underneath the horses' feet." The plaintiff had no lamp on his bicycle, and C. Street was dark but W. Street was light. There was testimony for the defendant that the plaintiff was riding very fast, and that he was on the left hand side of C. Street. There was also testimony for the plaintiff that the defendant's servant was driving very fast, and, as tending to corroborate that, that the hack went forty or fifty feet after the collision before it stopped, and that after the driver had dismounted the passenger told him to get on and go where he was going, that he wanted to get there in a hurry. The driver also testified on cross-examination that if the plaintiff was on the right hand side of C. Street and riding slowly, he would have seen him if he had looked. *Held*, that the questions of the due care of the plaintiff and of the negligence of the defendant's driver were for the jury.

In an action for personal injuries a ruling requested by the defendant "that the whole evidence is as consistent with plaintiff's want of due care as with his exercise of due care, and he is not entitled to recover," is rightly refused, whether it was so or not being a question of fact, under proper instructions, for the jury.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendants' servant in control of a hack drawn by two horses, with which the plaintiff collided while riding his bicycle across W. Street in Boston. At the trial in the Superior Court, before *Aiken*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

Digitized by Google

*G. L. Wilson*, for the defendants.

*R. L. Raymond*, for the plaintiff.

MORTON, J. We think that there was evidence for the jury on the question of the plaintiff's due care. There was testimony tending to show that the plaintiff came down Corning Street on the right hand side towards Washington Street, and that he was riding slowly and ringing his bell, and that before crossing Washington Street he looked northerly and saw the hack, and tried to cross over and get out of its way; or, as the plaintiff himself testified, "tried to make a sharp turn to get out of the way of the carriage, but he (meaning evidently the driver) made a turn quickly, then the pole caught me and knocked me off my bicycle and threw me underneath the horses' feet." The plaintiff had no lamp on his bicycle, and Corning Street was dark but Washington Street was light. There was testimony for the defendants tending to show that the plaintiff was riding very fast, and that he was on the left hand side of Corning Street. But the issue thus raised was plainly one for the jury.

We also think that there was evidence for the jury on the question of the driver's negligence. There was testimony tending to show that he was driving very fast, and, as tending to corroborate that, that the hack went forty or fifty feet after the collision before it stopped, and that after the driver had got off the hack the passenger told him to get on and go where he was going, that he wanted to get there in a hurry. The driver also testified on cross-examination that if the plaintiff was on the right hand side of Corning Street and riding slowly, he would have seen him if he had looked. This testimony, with the other testimony in the case, justified the court in submitting the question of the driver's negligence to the jury.

The ruling requested by the defendant "that the whole evidence is as consistent with the plaintiff's want of due care as with his exercise of due care, and he is not entitled to recover," was rightly refused. Whether it was so or not was a question of fact, under proper instructions, for the jury. To have given the ruling would have withdrawn from the jury the question of the plaintiff's due care, of which there was evidence.

*Exceptions overruled.*

Digitized by Google

GEORGE W. ANDERSON, administrator, *vs.* ADELINE F. LEAROYD.

Suffolk. March 16, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Fraudulent Assignment of Mortgage — Decree warranted by Pleadings.*

Under the pleadings in this case, which was a bill in equity by an administrator against the intestate's widow, alleging that a mortgage had been paid by the intestate and discharged by the mortgagee, but that afterwards the intestate, while embarrassed, had caused the mortgagee to execute an assignment to the defendant as though the mortgage had not been paid and discharged, for the purpose of defrauding his creditors, and praying that the defendant be ordered to execute a discharge, the judge would have been justified in finding, if the evidence warranted him in so doing, that the mortgage was duly assigned to the defendant, and that the legal title to it vested in her, and that there was no intent to hinder or delay her husband's creditors either on her part or his.

BILL IN EQUITY, by an administrator, against the widow of an intestate, praying that she be ordered to execute and deliver to the plaintiff a release and discharge of a mortgage. Hearing in the Superior Court, before *Lilley*, J., who entered a decree dismissing the bill with costs; and the plaintiff appealed. He also filed a motion, which was denied; and he appealed. The nature of the bill and of the motion appears in the opinion.

*G. W. Anderson, pro se.*

*F. E. Farnham*, for the defendant, submitted the case on a brief.

MORTON, J. There was a motion by the plaintiff in the Superior Court that the evidence taken by the official stenographer should be reported to the full court. The motion was denied; and the plaintiff appealed to this court, and the matter has been decided against him here. There remains only his appeal from the decree dismissing the bill with costs.

No evidence is before us, and the only question, therefore, is whether the decree is warranted by the pleadings. *Rankin* v. *Fitchburg Ins. Co.* 150 Mass. 55.

The substance of the plaintiff's bill is that the mortgage had been paid by the defendant's husband, and had been discharged

Digitized by Google

by the mortgagee, but that afterwards the defendant's husband, being in embarrassed circumstances, caused the mortgagee to execute an assignment of the mortgage to the defendant as though the mortgage had not been paid and discharged, for the purpose of securing the same to his own use and benefit and defrauding his creditors; and that no valuable consideration moved from the defendant, and she participated in her husband's fraudulent purpose. The answer admits that the defendant's husband paid to the mortgagee the full amount due under the mortgage, but denies that the mortgage was discharged, and alleges that, by a writing made at the time and executed by the mortgagee, it was assigned, and was intended to be assigned, to the defendant; and that afterwards, on hearing that this writing was informal and irregular, a proper assignment was placed on record by the defendant. It denies the charges of fraud and collusion, and that the defendant's husband, either at the time of the original transfer of the mortgage or at the time of the recording of the assignment, was in embarrassed circumstances, but alleges that he was able to pay, and did pay, all his debts.

It is manifest that under these pleadings the court would have been justified in finding, if the evidence warranted it in so doing, that the mortgage was duly assigned to the defendant, and that the legal title to it vested in her, and that there was no intent to hinder or delay her husband's creditors either on her part or his. Whether what took place operated as a payment and discharge of the mortgage or as an assignment was a question of fact depending on the intention of the parties. *Brown* v. *Lapham*, 3 Cush. 551. The fact that the mortgagor paid to the mortgagee the amount due under the mortgage would not necessarily operate as a payment and discharge of the mortgage and render an assignment of it by the mortgagee to a third party invalid. *Sheddy* v. *Geran*, 113 Mass. 378. *Hall* v. *Southwick*, 27 Minn. 234. Moreover, the writing that was executed by the mortgagee at the time she received the amount due had some tendency to show that what she received came from the defendant.

*Decree affirmed.*

Digitized by Google

## JULIA A. RADIGAN *vs.* STEPHEN F. JOHNSON.

Suffolk. March 20, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Conversion — Pledge — Lien — Waiver.*

In this case, which was an action for the conversion of certain horses which had been boarded by the plaintiff with the defendant, a stable keeper, there was no evidence which would warrant a finding that the defendant said or did anything that constituted a waiver of his right to insist upon the whole amount due him under the written agreement in evidence, and to hold the property as security therefor.

The fact that, while attempting to arrive at a settlement of the amount due for the board of the plaintiff's horses in the defendant's stable, the latter's counsel may have asserted for the moment a larger right than he could successfully maintain would not of itself constitute a conversion by the defendant, it being clear that he was entitled to possession as pledgee.

If the owner of horses which have been boarded with a stable keeper executes an instrument by which he relinquishes to the latter all claim on the horses "until his claim of" a sum named "for board and care is paid in full, which I agree to do by weekly payments of" a certain sum, what was said after the instrument was signed, in regard to the use by the owner of the property, would not affect the right of the stable keeper to hold it as pledgee for any balance that might be due.

TORT, for the conversion of certain horses and carriages, with a count in contract for the alleged breach of an agreement. After the former decision, reported 174 Mass. 68, the case was tried in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence that the plaintiff was the owner of certain horses and carriages used in conveying passengers in the city of Boston; that the defendant was a livery-stable keeper, at whose stable the plaintiff kept her horses and carriages; and that on October 9, 1897, the plaintiff was indebted to the defendant in the sum of $439.99 for board and care of her horses.

On October 10, 1897, the defendant asserted a claim of statutory lien upon the horses in question, and refused to allow them to be taken from the stable. On October 11, the parties signed an instrument, of which the following is a copy: "Boston, October 9, 1897. I relinquish to S. F. Johnson all claim on the three horses (3), one Kimball landau, and one Bennett coupé,



Digitized by Google

now in his possession, until his claim of $439.99 for board and care is paid in full, which I agree to do by weekly payments of $15. The board from this (October 9) date to be paid weekly. E. F. Radigan, Julia A. Radigan."

The plaintiff testified that after she had signed the above paper the defendant told her not to worry, that she had seven months to pay the bill; that she could "have the horses and continue just the same," and he would do all he could to help her; that if he needed more money, he would ask her for it, and she said that if she could let him have it she would give it to him; that he then told her husband to get his horses and go to work; that her husband did so, and that beginning with that evening there was no change in her method of using the horses, but when she wanted them she took them, just the same as ever.

The defendant, on cross-examination, testified that, after the paper of October 9 was signed, the plaintiff went on in her business in the usual way; and that he did not interfere with or exercise any control over these horses and carriages until he detained them again on January 21, 1898, as hereinafter stated.

The defendant further testified, on re-direct examination, that the horses and carriages were brought back to his stable every night; that his understanding was that, under that paper, he could hold the horses and carriages until his bill was paid; and that he was still holding them under that paper.

The plaintiff continued to keep the horses and carriages in question at the defendant's stable, and the payments of $15 a week were treated separately from the newly accruing account for board of the horses. The plaintiff from time to time paid money to the defendant, and it was agreed that he was allowed to apply these payments as he chose either to the old or to the new board. No bills were rendered on account of the old board after October 11, but bills were regularly rendered for the new board. The first payment applied upon the old board was made on October 15, 1897, amounting to $15; the second, on October 25, of the same amount; the third, on October 29, of $100; the fourth, on November 10, of $15; and the fifth, on December 16, of $25, making a total of $170. The receipts for these payments read, "Received —— dollars for use of horses and carriages," excepting the last two, which read, "On account."

Digitized by Google

The plaintiff further testified that she had never paid the defendant the whole amount of the bill of October 9, 1897. After October 11, the plaintiff paid the bills for the new board from time to time; but after a while, payment on that account became overdue, until, on January 15, 1898, the sum so overdue amounted to $128.

On January 21, 1898, the payments of $15 a week on account of the old board were also behind, the above named sum of $170 only having been paid, and on that day the defendant refused to allow the property mentioned in the instrument of October 9 to be taken from his stable, and the plaintiff has never had possession of any of the property since; but the defendant testified that it has since been in his possession, and that he was holding it under the agreement and had never sold the same, either under a claim of pledge or of a stable-keeper's lien.

The plaintiff testified that she got $100, and sent it to the defendant on February 5, 1898, to pay the board. It further appeared that upon receiving this sum the defendant instead of applying it to the new board, gave the plaintiff's husband a receipt for it upon account, using the same sort of receipt blank that he had used in all cases where he had applied payments to the old board.

On re-direct examination, the plaintiff testified as to the payments made by her as follows: "*Q.* Will you explain what you mean when you say you were not behind? *A.* After I had signed that paper the defendant came to me and asked me for a hundred dollars; I gave it to him. He said he would not push me weekly, as I had never paid a bill before weekly; my bills were always paid before monthly."

Adding the payment of $100, made on February 5, to $170, then already paid on the old board, made the amount of $15 per week for eighteen weeks, and thus applied paid the old board account to and including February 12, 1898.

Edward F. Radigan, husband of the plaintiff, testified that after the paper of October 9 had been signed and delivered to the defendant, the latter said to him that he could go ahead and take the carriages out and go on with the business; that thereafter he did take out the horses and carriages and continued so to do until January 21 following, when they were stopped again;

Digitized by Google

that he did nothing about it until a week or so afterwards, when the defendant called upon him, and the witness said that he was trying to raise some money and would see the defendant as soon as he got it, to which the defendant replied, "Very well, every little helps;" that subsequently, on February 5, he received $100 from his wife and took it to the defendant on the day following the conversation referred to and gave it to the defendant, telling him to apply it on account; and that, after the defendant had taken the money and given a receipt for it on account, the witness asked him if he could take out one of the teams, and the defendant replied, "No, you can't have any carriage until that board bill is paid, and I want that paid, and then you can take him out of here and take him where you like."

Radigan testified further that he was present at an interview which took place at the office of the defendant's attorney on February 11; that there were present the attorneys for both parties, Mr. Davis, an attorney, and the defendant; that the parties there figured what was due on the board bill; that the defendant was paid just exactly what was agreed to be due on account of the new board at that time and a day or two in advance; and that with reference to the $270 which had been paid on account of the $15 per week instalments on the old board, the defendant's attorney had said, in answer to an inquiry whether or not all payments due under the agreement of October 9 had been paid, "Well, whether or not all the payments due have been made is a matter of computation."

In regard to what transpired at this interview, after that answer, the witness further testified that he remembered that the plaintiff's attorney said, "Now, I understand we can take the carriages," and "they said we could n't; they claimed to own them;" that he remembered the words of the defendant's attorney were, "Furthermore, we now notify you that we own these carriages and horses"; and that the defendant was then present, and his attorney turned to him and said, "You understand, Mr. Johnson, that you refuse to let Mr. Radigan have the three horses and two carriages."

On cross-examination, the witness testified, among other things, as follows:

"*Q.* Now, do you remember at my office that Mr. Noble (the

Digitized by Google

plaintiff's attorney), said, 'I understand that Mrs. Radigan has permission to take all her property excepting what is mentioned in the paper that we call the mortgage,' and that I said, 'You have a right to take everything but the three horses, landau, and coupé, and we want you to take them at once, although of course you have a right to leave them here to-morrow'? *A.* Yes, sir. — *Q.* Now, do you remember Mr. Noble saying, 'Now, we want to know whether or not you claim anything to be due under your paper of October 9,' and that I said, 'We claim that the sum of $169.99, that is, the whole balance, is due us, and is due us to-day'? *A.* Yes, sir."

Arthur S. Davis, a witness called by the plaintiff, testified that he was an attorney at law, associated with the plaintiff's attorney in practice, and that he had been requested on February 11 to go to the office of Mr. Russell, the defendant's attorney, in relation to this case, and did so. As to what there took place, he testified that, upon the plaintiff's attorney asking Mr. Russell if there was any doubt about all the amounts that were due under the agreement of October 9 having been paid, Mr. Russell replied that $270 had been paid under that, but the payments had not been regularly made; that the plaintiff's attorney then called his attention to the fact that there were just eighteen weeks between October 9 and February 12, and that $270 made just eighteen payments at $15 a week, and he replied that that amount had been paid, and whether all that was due had been paid was a matter of computation, that the inference was correct if the payments were applied that way; that the matter of the board of the horses since October 9 was then taken up, and the plaintiff's attorney asked Mr. Russell practically what the amount due was, and he stated that there was $182 due on the previous Saturday, this conversation occurring on a Friday, that on the following day, February 12, there would be due another week's board at $18, but that the horses had earned $15 during that week, and he gave the plaintiff credit for that $15, leaving $3 to be added to the $182, making $185 due for board up to and including February 12; that the plaintiff's attorney then took out a package of money, saying to Mr. Russell that it contained $185, and that he paid it entirely on the new board, that is, the debt due under the agreement of

Digitized by Google

October 9, and handed the money to him, which he counted and acknowledged to be $185; that the plaintiff's attorney then said, "Now, we understand that Mrs. Radigan has a right to take out all her property, and that it is to be taken out under that agreement of October 9, just as it has been taken out ever since the dealings of the parties began under it"; that Mr. Russell said, "That is, you want to take them when and as you please"; that the plaintiff's attorney replied, "No," reiterating the statement that it was to be taken out only for use in the ordinary course of business, and as it had always been done under the agreement of October 9; that Mr. Russell then said, "We decline to let you take them at all," and, "furthermore, we claim to own this property"; that the plaintiff's attorney then asked him, "If that is so, how is it that you are charging us board?" and Mr. Russell replied, "Well, no matter what I have said, we claim to own the property; we shall continue to hold it until it is taken away from us by process of law"; and that Mr. Russell then turned to the defendant and said, "You understand, Mr. Johnson, that Mrs. Radigan demands this property of you, and that we refuse to let her have it," and the defendant said "Yes."

The defendant requested the judge to rule that on all the evidence the plaintiff was not entitled to recover. The judge so ruled, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

*W. M. Noble*, (*A. S. Davis* with him,) for the plaintiff.

*A. H. Russell*, (*E. M. Moore* with him,) for the defendant.

MORTON, J. This case was before us in the 174 Mass. 68, on the defendant's exceptions, which were sustained on the ground that the question "whether the defendant by accepting the amounts which were paid after he demanded a settlement in January, 1898, waived his right to insist upon the payment of the whole debt, was a question for the jury under suitable instructions." The case comes here now on exceptions by the plaintiff to a ruling by the court, directing, at the defendant's request, a verdict for him.

Taking the view of the appropriation of the payments most favorable to the plaintiff, it is clear that, after deducting the payments that were made on February 5 and February 12, there

Digitized by Google

remained a balance due the defendant under the agreement of October 9 of $169.99. It is also clear that when the defendant stopped the horses and carriages on January 21, the plaintiff was in arrear on the board that had accrued since October 9, and also on the weekly instalments which she had agreed to pay under the agreement of October 9. The defendant had a right to insist on the payment of the whole amount due under that agreement and to hold the horses and carriages as security therefor, and without going into detail we deem it enough to say that we do not discover in what took place in regard to the payment of the $100 on February 5 and the $185 on February 12 any evidence that would warrant a jury in finding that the defendant said or did anything that constituted a waiver of his right to insist on the payment of the whole amount due him under the agreement of October 9, and to hold the horses and carriages as security therefor. On the contrary, the only fair inference, we think, is that, notwithstanding those payments and however they might be applied, the defendant insisted, as he rightfully could do, that the plaintiff should pay all that was due and then take her horses and carriages away. The defendant, having a right as pledgee to the possession of the horses and carriages, could not, of course, be guilty of conversion so long as he held possession in virtue of that right. Whether he did not also have a stable-keeper's lien upon the horses notwithstanding the agreement of October 9 for any balance that might remain, we do not deem it necessary to consider. It would seem that he had none upon the carriages.

The fact that, while attempting to arrive at a settlement, counsel for the defendant may have asserted for the moment a larger right than he could successfully maintain, would not of itself constitute a conversion by the defendant, it being clear that the defendant was entitled to possession as pledgee.

What was said after the agreement of October 9 was signed in regard to the use of the property did not affect the right of the defendant to hold it as pledgee for any balance that might be due, as the plaintiff in substance admits on his brief in his form of stating the question.

We think that the entry must be, exceptions overruled.

*So ordered.*

Digitized by Google

## WILLIAM HEALEY *vs.* WELLESLEY AND BOSTON STREET RAILWAY COMPANY.

Suffolk. March 22, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Evidence — Contradiction of Witness by Entries in Time Book.*

The act of a foreman in turning a time book in to a superintendent as the record of the time worked by the men in his gang amounts to a representation that they have worked the time therein set down, and as such evidence of the entries is admissible to contradict him; and whether the entries were actually made by him or not is immaterial.

TORT, for personal injuries occasioned to the plaintiff while a passenger on one of the defendant company's cars. Trial in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

The accident happened while the plaintiff was going home from work on December 27, 1897. The plaintiff testified that he was an employee in the sewer department of the city of Newton, and that as a result of the accident he was unable to do a full day's work on December 28, 29, 30, and 31, the four days next following the accident, and that on each of these days he worked only six hours.

The plaintiff's father, Michael Healey, was foreman of the gang in which the plaintiff worked, and he testified that on December 28 the plaintiff worked only six hours, and that on none of the succeeding three days was he able to do a full day's work, and that he quit work on each of said days at, or soon after, two o'clock.

The defendant called one Child, who testified that he had been the superintendent of the sewer division of the city of Newton during the years 1897 and 1898, and up to the present time; that the pay roll of employees in the sewer department was made up from time books which had been turned in to him by the foremen; that he had in his possession the time books, which had been turned in to him by Michael Healey, foreman, showing the time worked by the employees in his gang during Decem-

Digitized by Google

ber, 1897, and up to October, 1898. There were two books, one of which would be turned in at the end of one week, and the other at the end of the week following. Child testified that he had supposed up to the morning of the trial that the entries in these books were made by Michael Healey personally, but that he had been informed that morning that the entries were made by another son of Healey. Child was then asked to testify as to what the books showed with reference to the time the plaintiff worked on December 28, 29, 30, and 31, 1897, respectively. Counsel for the plaintiff objected. The objection was overruled, and the testimony was admitted on the ground that it was competent for the purpose of contradicting the testimony of Healey, the judge stating: "Michael Healey testified as to his (the plaintiff) being absent, and he being the foreman and the books being turned in by him, I think it makes it competent." Child was then permitted to testify as to what the books showed as to the time the plaintiff worked for the city. It did not appear that Child knew the handwriting in which the entries were made, nor that any effort had been made to procure the presence of the person who made the entries.

*H. L. Whittlesey*, for the plaintiff.

*E. K. Hall*, for the defendant.

MORTON, J. The evidence to which the plaintiff excepted was admitted, as the exceptions state, solely for the purpose of contradicting Michael Healey, who was foreman of the gang in which the plaintiff worked, and who had testified how much the plaintiff was absent for several days following the accident. The time book from which the witness Child was allowed to testify was turned in to him by Michael Healey, and showed "the time worked by the employees in his gang during December, 1897, and up to October, 1898." Whether the entries were actually made by Michael Healey or not was immaterial. His act in turning the book in as the record of the time worked by the men in his gang amounted to a representation that they had worked the time therein set down, and as such evidence of the entries was admissible to contradict him. See *Brigham* v. *Clark*, 100 Mass. 430; *Handy* v. *Canning*, 166 Mass. 107.

*Exceptions overruled.*

Digitized by Google

## J. H. WENTWORTH COMPANY *vs.* GEORGE E. FRENCH & others.

Middlesex. March 22, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Mandamus — Matter of Discretion — Certificate of Shares held as Collateral — Assignment of Equitable Interest in Shares.*

The form of the stock certificate is conclusive as to the name in which a vote must be offered.

In Pub. Sts. c. 105, § 25, providing that the name of the "pledger" of stock held as collateral security shall be set forth in the certificate, and that he shall be responsible as stockholder, "pledger" means the general owner of the stock at the date when the certificate is issued.

When the statute is complied with, the "pledger" is entitled to vote.

A certificate of stock running to A., but stating on its face that it is held as collateral for the note of B. for $10,000, issued after B. has sold his rights to C., does not satisfy Pub. Sts. c. 105, § 25. Under such a certificate A. is the stockholder and entitled to vote.

It appearing that the equities were against the party having the legal right to vote and claiming an office by virtue of his exercise of the right, a writ of mandamus was refused.

PETITION for a writ of mandamus, declaring that at the annual meeting of the stockholders of the plaintiff company, held on January 10, 1900, Benjamin Dickerman, George W. Dickerman, and Charles W. Boynton were duly elected directors, and Benjamin Dickerman treasurer and clerk, and commanding George E. French, Claude T. Deaderick, and Arthur E. Wakeling to deliver to Dickerman, clerk and treasurer, all the books, papers, cash, and other property belonging to the corporation respectively held by them. Hearing before *Knowlton*, J., who reserved the case on the pleadings and an agreed statement of facts for the consideration of the full court. The facts appear in the opinion.

*E. A. Whitman*, for the petitioner.

*J. C. Ivy*, for the respondents, submitted the case on a brief.

HOLMES, C. J. This is a petition for a writ of mandamus declaring that Benjamin Dickerman, George W. Dickerman, and Charles W. Boynton are the duly elected directors, and that Benjamin Dickerman is the duly elected treasurer and clerk, of the petitioning corporation. Benjamin Dickerman is the holder

Digitized by Google

of a certificate for one hundred shares of stock in the company, which states on its face that it is "held as collateral for the note of James H. Wentworth for $10,000, dated April 8, 1898." There has been no breach of the conditions of the pledge. If Benjamin Dickerman had the right to vote on these shares, then the persons named have been elected directors, treasurer and clerk, and, subject to certain questions to be dealt with, a peremptory writ ought to issue, as in *American Railway-Frog Co.* v. *Haven*, 101 Mass. 398; otherwise the petition should be dismissed.

The corporation has to go by its record in determining the right to vote, and therefore, if a certificate of stock shows a certain person to be a member, the corporation must recognize him as member, with the right to vote as an incident to his membership. *Crease* v. *Babcock*, 10 Met. 525, 546. *National Bank* v. *Case*, 99 U. S. 628, 631. *Adderly* v. *Storm*, 6 Hill, 624, 627. *Franklin Bank* v. *Commercial Bank*, 36 Ohio St. 350, 355. *Magruder* v. *Colston*, 44 Md. 349, 356. *Commonwealth* v. *Dalzell*, 152 Penn. St. 217, 223. If the certificate holder is a pledgee, it may be that before breach the pledgor will be recognized in equity as the general owner for the purpose of voting as for other purposes. But in such cases the result has been worked out by compelling the holder to give a proxy to the pledgor, and thus the conclusiveness of the record for corporate purposes has been left unimpaired. *Vowell* v. *Thompson*, 3 Cranch C. C. 428. *Hoppin* v. *Buffum*, 9 R. I. 513, 518.

The provision in Pub. Sts. c. 105, § 25, by which a certificate of stock issued as a pledge or the like shall express the fact and the name of the pledgor "who alone shall be responsible as a stockholder," goes back through Gen. Sts. c. 68, § 13, to St. 1838, c. 98, § 3, and, it would seem, may have been suggested by the case of *Crease* v. *Babcock*, as the bill in that case was brought in 1837. When the requirements of that section are complied with, the form of the certificate allows the pledgor to be recognized as the member of the corporation for the purpose of voting as well as for the purpose of fixing responsibility, and under such circumstances the general understanding is that he is the proper person to vote. The statute in a different way reaches the result which equity reached by compelling the pledgee to give a proxy.

But the general rule remains that, as against a corporation of

Digitized by Google

which the stock is outstanding in the hands of third persons, no one has a right to vote except in the name of some one recorded as a member. In the case at bar the statute was not complied with. The certificate, to be sure, shows that Dickerman holds the stock as collateral security, but it does not show the name of the general owner; it simply states that the stock is collateral for the note of J. H. Wentworth. If it should be suggested that the language conveys by inference that J. H. Wentworth was the pledgor, the answer is that while in a literal sense that is the fact, it is not true that when the certificate was issued Wentworth remained the owner, because before that date Wentworth had sold the stock to French.* By "pledger" the statute plainly means the general owner of the stock at the date when the certificate is issued.

Upon a certificate in the form before us the choice lies between admitting the legal right of Dickerman to vote and disfranchising the stock. If there are equities in favor of French, they do not entitle him to vote in his own name until he gets his name upon the certificate. In this proceeding we must take the certificate as we find it. We see no sufficient reason for saying that the certificate discloses no member of the corporation, and therefore are driven to the conclusion that Dickerman is the member and technically has a member's right. Whether he also has a member's responsibilities it is not necessary to decide. In view of the peculiar wording of our statute the reasoning of *Burgess* v. *Seligman*, 107 U. S. 20, although pertinent, is not conclusive. See *Holyoke Bank* v. *Burnham*, 11 Cush. 183, 187; *Barre National Bank* v. *Hingham Manuf. Co.* 127 Mass. 563, 571.

It will be understood that we go wholly on the form of the certificate and not at all upon the fact that Dickerman got his

* The shares were issued to Dickerman as collateral on December 5, 1899, and the agreed facts recite that on July 14, 1898, "Wentworth sold to George E. French, for a fair present consideration, . . . all his interest in the capital stock of said corporation, of which ninety-seven shares were transferred to French and one share to Charles W. Boynton, a nominee of French, on the books of the corporation and new certificates issued therefor; and at said time Wentworth assigned to French his equity in the one hundred shares of stock held by Dickerman, and a memorandum of this assignment was noted on the stub of the certificate book recording the issue to Wentworth and the pledge thereof to Dickerman, who knew of this sale and transfers and assignment and made no objection thereto."

Digitized by Google

title by a transfer of a certificate indorsed in blank with no express agreement as to the right to vote, and after the passage of St. 1884, c. 229.

But although we think that a technical case is made out for Dickerman for the reasons which we have given, we nevertheless are of opinion that the writ ought not to issue. The certificate before us was issued in consequence of a decree upon a bill brought by Dickerman, in which Dickerman claimed the right to vote and set that up as one of the grounds for his demand to have a certificate issued in his name. French, who was one of the defendants, admitted his right to have a certificate issued to him in a form showing that the stock was held as collateral security. The decree required that the certificate should express upon its face that the shares were "held as collateral for the note of James H. Wentworth for $10,000, dated April 8, 1898." This, although it does not quite say so, must have meant that the plaintiff was to have a certificate in the form provided for by Pub. Sts. c. 105, § 25, and that the general owner of the stock was to have the rights incident to his position. On the facts this seems to be the proper conclusion. If so, the writ ought not to issue. It is true that we cannot fully adjust the equities of the parties in this proceeding, but we may take them into account in the exercise of the discretion which we properly may use in issuing or refusing the writ. *Waldron* v. *Lee*, 5 Pick. 323, 329. 13 Encyc. of Pl. & Pr. 498, 499.

*Petition dismissed.*

---

FREDERICK H. HARRIS, executor, *vs.* MYRA E. STARKEY.

Hampden. March 22, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Correction by Probate Court of Mistakes in its Decrees.*

A decree of distribution can be revised after the executor has distributed the estate as ordered so as to enable one, who is entitled to share in the estate but who has been by mistake omitted in the decree of distribution and who is not chargeable with laches, to recover his share from those to whom the estate has been distributed.

Digitized by Google

APPEAL from an order of the Probate Court dismissing a petition by Myra E. Starkey for a revision of the order of distribution of the estate of Daniel P. Kingsley, who died testate in 1886. Hearing before *Knowlton*, J., who reported the case for the consideration of the full court, such decree to be entered as law and justice might require. The facts appear in the opinion.

*J. L. Rice*, for the appellant.

*F. E. Carpenter*, for the appellee.

MORTON, J. The appellant was one of the heirs at law of Daniel P. Kingsley, who died testate, and as such was entitled to one eleventh part of the rest and residue of his estate. Through ignorance and mistake on the part of the executor and the judge of the Probate Court she was not named in the decree of distribution as one of the persons amongst whom the rest and residue was to be divided. She herself had no notice or knowledge of the probate of the will of said Kingsley, nor of the application for an order of distribution, nor of the proceedings thereon, nor of the payments made by the executor under the decree of distribution, nor of the account rendered by him of such payments and its allowance, till long after all these things had been done. This is a petition by her that the order of distribution be modified so that the executor shall be directed to distribute the funds to her and the others named in the order, — one eleventh to each. The petition was dismissed in the Probate Court. An appeal was taken by her, and the case comes before us on a report from the single justice who heard the case, and who directed the decree of distribution to be so modified that payment should be made to the appellant and the ten others named in the decree in equal shares of one eleventh each. But in the decree which he ordered to be entered he directed that the decree should not require the executor to take further action, nor impose upon him any liability, but should take effect only to correct the errors of the former decree and establish the right of the petitioner to a distributive share as against the other distributees to whom payments had been made, and to give to her and to the executor such rights as against such other distributees as might arise from the correction of these errors.

It is manifest that the appellant will be without a remedy unless she can maintain this petition. She cannot attack the

Digitized by Google

former decree collaterally, and from the nature of the proceedings it will be conclusive and binding upon her so long as it stands unrevoked and unmodified, even though she may have had no actual notice of the proceedings. The executor is protected from liability by it and by the return and allowance after due notice of his account containing the payments made by him pursuant to the decree. And the only way in which the appellant can procure a revision or modification of it is by proceedings instituted in the Probate Court for that purpose. *Loring* v. *Steineman*, 1 Met. 204. *Pierce* v. *Prescott*, 128 Mass. 140. *McKim* v. *Doane*, 137 Mass. 195. *Shores* v. *Hooper*, 153 Mass. 228, 232. *Bonnemort* v. *Gill*, 167 Mass. 338.

It is too well settled to require discussion or consideration that the Probate Court has the power to correct errors or mistakes in its decrees. *Waters* v. *Stickney*, 12 Allen, 1. *Cleveland* v. *Quilty*, 128 Mass. 578. *Gale* v. *Nickerson*, 144 Mass. 415. *Tucker* v. *Fisk*, 154 Mass. 574. And the present case seems to us to be an eminently proper one for the exercise of that power. It is found that the appellant was one of the heirs of the testator. As such she was entitled to a share of the rest and residue. Through no fault or negligence of her own her name was not included amongst the distributees. The other distributees have received the share which belonged to her. Unless the decree is modified and corrected as proposed they will be permitted to retain funds to which, as against this appellant, they are not justly entitled, and to which the only claim that they have is by virtue of a payment made to them by the executor pursuant to a decree founded as between this appellant and them in ignorance and mistake on the part of the executor and the judge of the Probate Court. It needs no argument, we think, to show that under such circumstances the decree should be revised and corrected, so far as can be done without imposing any liability on the executor. The decree ordered to be entered by the single justice avoids that, and establishes the right of the appellant to a distributive share as between her and the other distributees, and gives her and the executor such rights against them as arise from a correction of the errors in the former decree; thus enabling the executor and her to take steps against them for the recovery of the share to which she is held to be

Digitized by Google

entitled, without being met by the objection that she has no right to a distributive share under the decree of distribution.

As the report stands we see no ground on which laches can be imputed to the appellant, and we think that a decree as ordered by the single justice should be entered.

*So ordered.*

---

WILLIAM T. WAY *vs.* WALTER R. DYER & others, executors.

Suffolk. March 23, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Mortgage — Validity of Foreclosure Sale — Failure to advertise Adjournment of Sale — Mistake in stating Amount due on Prior Mortgage — Equity.*

It is no objection to the validity of a sale of land under a power in a mortgage, after several adjournments, that the adjournments were not advertised, if it does not appear that the failure so to advertise resulted in any sacrifice of the property or involved any injury to the owner of the equity of redemption.

The owner of the equity of redemption in land sold under a power in the mortgage, after several adjournments, has no standing, nineteen months after the sale, to object to its validity on the ground that the adjournments were not advertised, if they were all made at the request of the person who represented him and the title in all matters relating to the foreclosure, and who consented to the notices in the form in which they were given, and knew of the sale and made no objection to it.

A mistake in an advertisement of a sale of land under a power in a mortgage, in overstating the amount due on a prior mortgage, cannot affect a purchaser in good faith and for a valuable consideration after the foreclosure and without any actual or constructive knowledge of the error.

BILL IN EQUITY, filed November 6, 1899, against Walter R. Dyer, Benjamin Harris, and Max E. Wyzanski, and Charles E. Wyzanski, executors of the will of Henry Wyzanski, to redeem land from a sale under a power in a third mortgage made to the defendant Dyer by one Donoghue, who conveyed the land to the plaintiff subject to the mortgages thereon, the other defendants being purchasers from Dyer after the foreclosure sale; and also for an accounting in regard to the first and third mortgages. Hearing before *Knowlton*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

Digitized by Google

*C. F. Kittredge*, for all the defendants except Dyer.

*J. W. Keith*, for the plaintiff.

MORTON, J. This is a bill to redeem from a foreclosure sale under a third mortgage for $1,000, and also for an accounting in regard to that and the first mortgage. The case was heard by a single justice, who was of the opinion that the bill should be dismissed as to all of the defendants except Dyer, but that as against him the plaintiff was entitled to an account, for the reasons stated in the report.* The case comes here on a report made at the request of all of the defendants except Dyer.

It is found that, when the foreclosure proceedings were commenced and concluded, interest was due on the amount secured by the third mortgage. It appears that the property was duly advertised for sale, according to the terms of the power, on July 12, 1897; but the sale was then adjourned, and was adjourned afterwards from time to time, and did not finally take place until March 21, 1898. Before the property was advertised for sale, the plaintiff had conveyed the equity of redemption to one Marcus by an absolute quitclaim deed, though there was an oral trust between them. Marcus, it is found, had full authority from the plaintiff to look after all matters relating to the foreclosure, and knew all about the proceedings to foreclose, and procured adjournments from time to time till the sale was made, and all the adjournments were made at his request. It is also found that he consented to the notices in the form in which they were given, and represented the plaintiff and the title in all matters relating to the foreclosure and adjournments. It is further found that "Marcus knew of the time of the sale, and there is no testimony that the sale was for an inadequate price, or that there was not a good number of bidders present." Through mistake and inadvertence there was an error in stating in the advertisements the amount due under the previous mortgages,

* The statement in the report was as follows: "I was of opinion, and decided, that the plaintiff's bill should be dismissed with costs in favor of all the defendants except Walter R. Dyer, and that, as against him, the plaintiff is entitled to an account of the proceeds of the sale under the third mortgage to Cavanagh, who bought as Dyer's representative for $150, treating the land as subject to prior mortgages for $11,274 and unpaid taxes and assessments, when as a fact the charges on the land were much less."



Digitized by Google

and it was stated at much more than the amount actually due. The property is now in the hands of parties who were strangers to the foreclosure proceedings, and who all bought in good faith, for a valuable consideration, after the foreclosure sale, and believing the foreclosure to be in all respects regular. Since purchasing, they have expended on the property $30,000 to $40,000 in improvements. The bill in this case was not filed till November 6, 1899, upwards of a year and a half after the foreclosure sale. There was also a foreclosure sale under the first mortgage, but, in view of the conclusion to which we have come regarding the proceedings under the third mortgage, it is not necessary to consider that. The foreclosure sale that we deal with is that under the third mortgage.

The principal objection urged against the validity of the sale is the failure or omission to advertise the adjournments. But, as said in *Marcus* v. *Collamore*, 168 Mass. 56, "there is no absolute rule of law to that effect. The first advertisements are required by the mortgage; any other or further duties of the mortgagee are less defined, and are embraced under the general obligation to make reasonable efforts to prevent a sacrifice of the property." In the present case, as already stated, it is expressly found that "there was no testimony that the sale was for an inadequate price, or that there was not a good number of bidders present." So far as appears, therefore, the failure to advertise the adjournments did not result in any sacrifice of the property, and involved no injury to the plaintiff. See also *Hosmer* v. *Sargent*, 8 Allen, 97; *Dexter* v. *Shepard*, 117 Mass. 480; *Stevenson* v. *Dana*, 166 Mass. 163. Moreover, the adjournments were all made at the request of Marcus, who represented the plaintiff and the title in all matters relating to the foreclosure, and who consented to the notices in the form in which they were given, and knew of the sale, and does not appear to have made any objection. The plaintiff is bound by the conduct of Marcus, and cannot be heard months after the sale took place to object for the first time that the adjournments should have been advertised, even if the objection would have been valid if seasonably made, which we do not intimate.

The mistake in the amount due on the previous mortgages could not affect any of the defendants except Dyer, the others

Digitized by Google

being purchasers in good faith and for a valuable consideration, after the foreclosure, and without any knowledge, actual or constructive, of the error. *Silva* v. *Turner*, 166 Mass. 407.

*Bill dismissed with costs in favor of all the defendants except Dyer, and as to him the plaintiff is entitled to an accounting.*

---

RICHARD C. HUMPHREYS, trustee, *vs.* ALFORD C. WILTON & others.

Suffolk. June 5, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

*Will — Codicil — Termination of Trust.*

A testator provided that the residue of his property should be invested "for the term of ten years after my decease, the income to be equally divided between my sons and grandchildren." A codicil provided as follows: "Whereas, by my last will and testament dated the eleventh day of April, 1888, in article 10th I gave to my sons and grandchildren the income of rest and residue of my property, after paying my debts and legacies, to be equally divided between them. I do hereby revoke the said legacy, and instead thereof I give and bequeath the income of the said rest and residue of my property as follows: One eighth of the same to my son J., the other seven eighths to my son A. and my grandchildren to be divided equally between them." A new legacy was added, and the codicil concluded as follows: "And I do hereby ratify and confirm my aforesaid will in all respects, except so far as changed or altered by this codicil." *Held*, that there was nothing in the codicil that changed the nature of the trust or the term of its continuance, and that the trust terminated at the end of the ten years after the testator's decease.

PETITION to the Probate Court for instructions as to the construction of the will of Alford B. Wilton. A decree was entered to the effect that the trust covering the residue of the estate was terminated, and the trustee was ordered to pay over the trust estate and any accumulations free from trust in equal portions to the two sons of the testator, John George S. Wilton and Augustus W. Wilton. Alford Cyrus Wilton appealed to this court. Hearing before *Hammond*, J., who found that the only heirs at law of the deceased at the time of his death were John George S. Wilton and Augustus W. Wilton; that Alford Cyrus Wilton

Digitized by Google

and George H. Wilton were sons of Augustus W. Wilton, and that both the said John George S. and Augustus W. were living. The judge reserved the case for the consideration of the full court. The material facts appear in the opinion.*

*W. H. Baker & J. Spektorsky*, for Alfred C. Wilton.

*H. P. Harriman & H. E. Perkins*, for John G. S. and Augustus W. Wilton.

KNOWLTON, J. This is a petition by a trustee under a will for instructions. The tenth clause of the will of the testator is as follows: "All the rest and residue of my property I wish to be invested as it now is, or as my executor may think best to invest for the term of ten years after my decease, the income to be equally divided between my sons and grandchildren." The first part of the codicil is in these words: "Whereas, by my last will and testament dated the eleventh day of April, 1868, in article 10th I gave to my sons and grandchildren the income of rest and residue of my property, after paying my debts and legacies, to be equally divided between them. I do hereby revoke the said legacy, and instead thereof I give and bequeath the income of the said rest and residue of my property as follows: One eighth of the same to my son John George S. Wilton, the other seven eighths to my son Augustus W. Wilton and my grandchildren, to be divided equally between them." A new legacy is added, and the codicil concludes as follows: "And I do hereby ratify and confirm my aforesaid will in all respects, except so far as changed or altered by this codicil." The petitioner was duly appointed a trustee under the will, and has been executing the trust created by the tenth clause of the will. The term of ten years, mentioned therein, has expired, and the principal question is whether the trust is terminated or is still alive.

The appellant contends that the codicil not only revoked the legacy and gave the income referred to in different proportions to the testator's sons and grandchildren, but that it also revoked the provision directing the continuance of the trust for the term of ten years, and impliedly directed that the property should be held in trust and the income paid over until the death of the last of his grandchildren.

We do not find anything in the codicil that changes the nature

* For another decision upon this will, see *Wilton* v. *Humphreys*, *ante*, 253.

Digitized by Google

of the trust or the term of its continuance. The change is only in the proportions in which the income is to be divided among the children and grandchildren. Nothing is said in the codicil about any other investment than that called for by the tenth clause of the original will, which is the investment to be continued for the term of ten years after the decease of the testator. The property disposed of by the codicil is "the income," which means "the income" referred to earlier in the same sentence, namely, the income to be derived from the investment directed in the original will.

We are of opinion that the decree of the Probate Court declaring the trust terminated and directing that the trust estate be paid over in equal proportions to the two sons of the testator is correct. *Decree affirmed.*

---

JOSEPH S. WEEKS *vs.* SARAH H. EDWARDS, administratrix, & others.

Barnstable. June 5, 1900. — June 21, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, BARKER, & HAMMOND, JJ.

*Law and Equity — Resulting Trust — Petition and Partition — Inconsistent Remedies.*

A bill in equity to establish a resulting trust in land and a petition at law for the partition of the same are not inconsistent.

BILL IN EQUITY, to establish a resulting trust. The defendants set up a plea in bar, the nature of which appears in the opinion; and the plaintiff filed a motion to set aside the plea on the ground that the same was insufficient to meet the allegations of the plaintiff's bill. Hearing before *Fessenden*, J., who allowed the plaintiff's motion, ordered that the plea be set aside as insufficient, and reported the case for the determination of this court, such decree to be entered as law and justice require. The facts appear in the opinion.

*B. N. Johnson & R. P. Clapp*, (*W. O. Underwood* with them,) for the defendants.

*C. F. Chamberlayne*, for the plaintiff.

Digitized by Google

HOLMES, C. J. This is a bill to establish a resulting trust in a parcel of land in Falmouth, formerly belonging to the father of the plaintiff and defendants, on the ground that the plaintiff intrusted half the purchase price to his father upon the understanding that the latter would buy the land for both, with additional circumstances not necessary to mention. The defendants pleaded that before bringing this bill the plaintiff began proceedings in partition in the Probate Court, in which he alleged that his interest in the land was one fifth; (that is, his share by descent;) that the defendants appeared and admitted the plaintiff's interest as stated; that afterward the plaintiff petitioned for leave to discontinue those proceedings, but that the Probate Court denied leave without prejudice, and continued the proceedings to await final action in the present cause. The judge of the Superior Court ruled that these facts were no bar to the bill, and would not justify a dismissal of the bill, and reported his ruling to this court.

The ruling was right. The ground taken by the defendants is that the partition proceedings are inconsistent with this bill in equity, that if they had gone to judgment they would be a bar, and that therefore the pendency of them equally is a bar. It is unnecessary to say all that might be said in answer to this argument. It is enough that the proceedings are not inconsistent. Those for partition go on the legal title. The plaintiff has a legal title to one fifth. It is consistent with this that he should have an equitable right to a larger share. The assertion of the equitable right is not inconsistent with a wish to have what he is admitted to own set off to him. All that can be said is, that, when asserting an equitable title, a man would not be so likely to ask for a partition before as after the equitable rights were disposed of, and either adjudicated against or turned into legal rights by conveyances. This the plaintiff recognized, and it is not his fault that the partition proceedings still are in court. But there is no logical inconsistency in his asserting his admitted legal rights and his controverted equitable rights at the same time. *Louvalle* v. *Menard*, 6 Ill. 39, 42–44. *Greenup* v. *Sewell*, 18 Ill. 53, 54. *Williams* v. *Van Tuyl*, 2 Ohio St. 336, 338.

Before Rev. Sts. c. 103, § 33, now Pub. Sts. c. 178, § 35, a judgment in partition bound the possession only. *Pierce* v. *Oliver*,

Digitized by Google

13 Mass. 211, 213. The commissioners suggested the provision in that section (making the judgment conclusive of the parties' rights both of property and of possession) on the ground that, if, as they proposed, the writ of right should be abolished, a party never could recover lands unless he had the right of possession, and that it would follow that a partition under this change in the law of real actions would bind the rights of property also. They added that the result was explicitly stated in order to prevent any doubt or mistake on the subject. Report on Rev. Sts. c. 103, § 30, note. See also Rev. Sts. c. 103, § 68; Pub. Sts. c. 178, §§ 47, 63. It is plain by the form of their statement that by rights of property is meant rights that could be asserted in a writ of right, that is to say, rights at common law, apart from the question whether in strictness equitable rights are property in the land or more than *jura in personam*, now as formerly. *Western Union Telegraph Co.* v. *Caldwell*, 141 Mass. 489, 492.

It is said that the bill sets up a title by adverse use, and it is true that there are allegations that the plaintiff, with the consent of his father, entered upon the premises more than twenty years before as owner in fee, and made valuable improvements. But it is apparent that these allegations do not mean that he has gained a legal title to the whole parcel, as the plaintiff claims only a right to one half. Whether he has a legal title to any specific part is not plain, and is not material now, as the relief sought is a conveyance, and to the extent that a conveyance is asked we must take it that a legal title is not claimed.

The case is not argued for the defendants as one of election, and plainly is not one. The plaintiff is not called upon to choose between his legal and his equitable title. He has a right to assert his equitable title in addition to that which he has by the common law. There is not even occasion to require the plaintiff to elect between remedies, as when he has vexed the defendant with two suits for the same cause. *Sandford* v. *Wright*, 164 Mass. 85, 87. *Connihan* v. *Thompson*, 111 Mass. 270, 272.

*Plea not allowed; defendants to answer.*

Digitized by Google

## OCTAVIUS B. SHREVE & another, executors, *vs.* MARY L. SHREVE & another.

Essex. November 9, 1899. — June 22, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, HAMMOND, & LORING, JJ.

*Will — Waiver by Widow — Residue in Trust — Acceleration — Disappointed Legatees — Sequestration of Income.*

A testator gave by will the residue of his estate, in trust, the income of one half to be paid to his son O., and the income of the other half "to my wife, or they [the trustees] shall apply the income and interest as they may judge best to the support and maintenance of my wife and children by her begotten, till there is no child surviving under twenty-one years of age, or till all shall have died before arriving at the age of twenty-one years. After they shall have arrived at twenty-one years of age, one half of the income shall be paid to my wife, during her life-time. And the other half (and the whole, in case my wife shall have deceased) shall be applied to the support and maintenance of the children mentioned in this part of my will and the whole income at the death of my wife." The testator was twice married, and left as his only issue two sons, O. by his first wife, and H., a minor of eighteen, by his second and surviving wife, who waived the provisions of the will. *Held*, that before H. became of age the income of one half of the residue being payable to the widow and H. jointly became, under the doctrine of *Plympton* v. *Plympton*, 6 Allen, 178, payable to H. alone, and that after H. became of age the income payable to the widow was sequestered to compensate the disappointed legatees O. and H., and was payable to them severally in the ratio in which they were respectively disappointed.

BILL IN EQUITY, by the executors of and the trustees under the will of Benjamin Shreve, praying for the construction thereof.

After a devise to his son, Octavius B. Shreve, of the messuage on Chestnut Street in Salem, the testator gave the residue in trust, the income of one half to be paid to Octavius, and then provided as follows:

"The other half part of the residue of my estate, real and personal, my trustee or their successor or successors, shall hold under this trust. They shall pay the income to my wife, or they shall apply the income and interest as they may judge best to the support and maintenance of my wife and children by her begotten, till there is no child surviving under twenty-one years of age, or till all shall have died before arriving at the age of twenty-one years. After they shall have arrived at twenty-one

Digitized by Google

years of age, one half of the income shall be paid to my wife, during her lifetime. And the other half (and the whole, in case my wife shall have deceased) shall be applied to the support and maintenance of the children mentioned in this part of my will and the whole income at the death of my wife. When either child dies leaving issue the trustees shall appropriate from the trust fund and pay over to such issue a sum equal to the principal from which the parent drew his or her income, and the issue of any deceased child shall receive at the death of my wife, its distributive share of the principal from which my wife drew her income. If either child dies, leaving no issue, his or her share in the income and interest shall be paid to the surviving child or children. If the last surviving child dies without issue, the trust estate shall be conveyed, and paid over to my heirs at law at that event. If the children shall all die before arriving at twenty-one years of age, leaving no issue, one half of the fund held in trust under this part of my will shall go to their issue, respectively, if any, if no issue, then it shall be conveyed and paid over to my heirs at law. At the death of my wife, no issue of mine by her begotten, surviving, the estate then shall be conveyed and paid over to my heirs at law who will be my heirs at law at that time."

The bill alleged that Benjamin Shreve was twice married, and left a widow, Mary L. Shreve, and as his only issue two sons, Octavius B. Shreve, a son by his first wife, and Henry M. Shreve, a minor of the age of eighteen years, son of his second wife, Mary L. Shreve; that, she having waived the provisions of the will, commissioners had assigned to her dower in the lands of her deceased husband, and that after payment to her of the $10,000 to which she became entitled by the waiver, and after setting aside to be held in trust the balance of such portion of the personal estate as she was entitled to receive the income of, and after paying all other expenses and liabilities, there remained more than $75,000 of personal property and real estate.

The prayer was for an answer to the following questions:

"1. What shall be done with the income of said half of the residue until said Henry M. Shreve becomes of the age of twenty-one years? 2. What shall be done with the income of said one half of the residue during the lifetime of said widow,

Digitized by Google

after said Henry M. Shreve becomes of the age of twenty-one years?"

*Hammond*, J., reported the case for the determination of the full court.

*G. F. Richardson*, (*D. M. Richardson* with him,) for the plaintiffs.

*H. P. Moulton*, for the defendants.

HAMMOND, J. The testator was twice married, and at his decease he left surviving him a widow, Mary L. Shreve, and, as his only issue, Octavius B. Shreve, a son by his first wife, and Henry M. Shreve, a son by the said Mary, his second wife.

The general scheme of the will is that after the devise of "the messuage on Chestnut Street" to his son Octavius, the residue shall be held in trust, the income of one half to be paid to Octavius, and that of the other half to be paid to or for the benefit of the widow and her children; and the beneficiaries of one half have no interest in or control over the other half. This general purpose meets with no interference by the widow's waiver, except so far as this residue is thereby diminished. The will is to be read as though there were no provisions for the widow.

Excluding her from the operation of the will, it is plain that during the minority of Henry the residue, as reduced by the amount taken by the widow under her waiver, is to be held in trust, the income of one half of which is to be paid to or for the use of Octavius, and that of the other half, which under the will was to be paid to the widow and Henry jointly, is to be paid to or for the use of Henry. *Firth* v. *Denny*, 2 Allen, 468. *Plympton* v. *Plympton*, 6 Allen, 178. *Brandenburg* v. *Thorndike*, 139 Mass. 102.

But the will provides that the income of the second half shall be paid, after Henry becomes of age, to him and the widow, not jointly, but in separate portions. Hence a different rule applies. The widow having waived the provisions of the will, and the trust estate being thereby diminished by the amount required to satisfy her claims, both Octavius and Henry are disappointed legatees.

The rule of law is, that if there be a devise for life with remainder over, and the life estate be renounced or it be void, the remainder is good and takes effect immediately. *Shelley's case*, 1 Co. 88 b, 101 a. *Fuller* v. *Fuller*, Cr. Eliz. 422, 423.

Digitized by Google

So far as respects Henry, he would be compensated by this doctrine of acceleration; and if no other devisees or legatees were affected, the result would be simply that upon arriving at his majority he would receive not only the income given to him under the will, but also that given to the widow.

But it is manifest that this would not do justice to Octavius, the other disappointed legatee. His income also has been diminished by the act of the widow, and it is just that some portion of the legacy renounced by the widow should go to compensate him.

The legacy which the widow has renounced from which compensation is to be made is the income of one fourth of the residue from the time Henry reaches his majority until her death. Under these circumstances equity, by the great weight of authority, will sequester a portion of this income for the benefit of Octavius and his family. *Firth* v. *Denny*, 2 Allen, 468. *Plympton* v. *Plympton*, 6 Allen, 178. *Timberlake* v. *Parish*, 5 Dana, (Ky. 345. *Hinkley* v. *House of Refuge*, 40 Md. 461, 469. *Latta* v. *Brown*, 96 Tenn. 343. *Jones* v. *Knappen*, 63 Vt. 391. *McReynolds* v. *Counts*, 9 Grat. 242. *Morriss* v. *Garland*, 78 Va. 215. *Dillon* v. *Parker*, 1 Swanst. 359. *Gretton* v. *Haward*, 1 Swanst. 409. *Batione's estate*, 136 Penn. St. 308. Story Eq. Jur. §§ 1083, 1084, and cases cited.

By the scheme of this will Octavius was to have twice as much income as Henry during the life of the widow. By any diminution of the principal from which this income is derived, the income of the former, as compared with the latter, is diminished two dollars for one. Equity requires that his compensation from the fund renounced by the widow should be in the same ratio.

The result is that that part of the income which was renounced by the widow, accruing after Henry comes to his majority, namely, one fourth of the income of the estate, should be shared between Octavius and Henry in the ratio of two to one, so that the former shall receive two thirds and the latter one third of this income; and since the remaining income is divided in the same ratio, it follows that the whole income is to go, two thirds to Octavius and one third to Henry.

*Decree accordingly.*

Digitized by Google

## MARY G. TALLANT *vs.* WALTER R. STEDMAN.

Suffolk. December 15, 1899. — June 22, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Action for Money Fraudulently obtained — Election as to Mode of Procedure — Proof in Insolvency of Claim created by Fraud — Law and Fact — Waiver — Promissory Note — Evidence as to Undisclosed Intention.*

In this case, which was an action to recover money fraudulently converted by the defendant to his own use, it having been intrusted to him for the purchase of certain shares of stock, it cannot be fairly held that the acceptance of a certain sum of money, it being the equivalent of the dividend then due upon the shares, sent by the defendant in a letter, and of certain similar subsequent instalments, and the acceptance of two agreements signed by the defendant, one whereby he promised to pay the plaintiff the amount due with interest, and the other whereby he agreed to deliver to the plaintiff or his legal representatives the shares of stock in question, on condition that for each share so delivered a certain sum should be indorsed on a note of even date, the plaintiff not being compelled to accept the stock but having the right to demand payment in money, were an election by the plaintiff to hold the defendant liable to make restitution by transferring to the plaintiff the shares, with the dividends thereon, until the stock should be handed to him, and to relinquish his right to demand from the defendant the amount due, with interest, until repaid.

By proving in insolvency proceedings a claim created by fraud, the creditor does not lose his right to sue the insolvent under Pub. Sts. c. 157, § 84, and even if his testimony is taken literally to mean that, in making his proof in insolvency, he went on a note and not on the fraud, he is not thereby, as matter of law, to be taken to have waived the fraud.

On the issue, in an action to recover money fraudulently converted by the defendant to his own use, whether there was an agreement between the plaintiff and the defendant that certain promises of the defendant were taken in satisfaction of the plaintiff's claim against the defendant for his fraud, it is not competent to put in evidence the undisclosed intention of the plaintiff not to accept the written promises of the defendant in satisfaction of his original claim.

CONTRACT OR TORT, to recover money fraudulently converted by the defendant to his own use. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*A. P. Worthen*, for the defendant.

*H. W. Putnam*, for the plaintiff.

LORING, J. In this case the plaintiff introduced evidence showing that she had been cheated by the defendant out of

Digitized by Google

$1,152.50 in the following way. On the 15th of May, 1884, she gave to the defendant, who was a stockbroker in Boston, but not a member of the Boston Stock Exchange, an order to buy for her ten shares in the capital stock of the Chicago, Burlington, and Quincy Railroad. On the next day, between the hours of eight and half past eight o'clock in the morning, the defendant called at her house and told her that he had bought the ten shares of stock ordered at 115, and that his commission was one fourth of one per cent, amounting to $2.50; she thereupon paid him $1,152.50. On May 23, the defendant wrote the plaintiff that he could not deliver to her the certificate for this stock, because the books were closed, and would not be open until the 5th of June. As a matter of fact, the defendant did not buy any shares for the plaintiff on May 15; the books for the transfer of the stock in question were not closed until the close of the business day of May 24, nine days later; and the defendant paid the $1,152.50 obtained by him from the plaintiff to T. J. Loud and Company, who were members of the Boston Stock Exchange, and were carrying stocks bought by the defendant for speculation on his own account, to keep his margin on that account good. This account was not kept good, and was subsequently closed out by the sale or purchase of the securities there in question. On the 19th of June, the defendant wrote to the plaintiff, enclosing $20, "the dividend on 10 shares C. B. & Q.," telling her that he had failed, and her money had gone in his failure while "waiting for the books to open." The plaintiff handed this letter to one Jenks (since deceased), who was a cousin of her deceased husband. On July 22 or 23, she received from the defendant a letter thanking her for her kindness, and enclosing an agreement, dated May 16, 1884, whereby he promised to pay to her on demand $1,150, with interest at the rate of $80 per annum, payable quarterly, beginning on March 15, 1884; and an agreement, also dated May 16, 1884, to deliver to the plaintiff or her legal representatives ten shares of the capital stock of the Chicago, Burlington, and Quincy Railroad, within twelve months from the date thereof, on condition that, for each share so delivered, $115 should be indorsed on the promissory note of even date, it being understood that the plaintiff should not be compelled to accept the stock in liquidation

Digitized by Google

of the note, but should have the right to demand payment in money.

The plaintiff testified that she had received various payments of interest from the defendant, and "soon after his last payment to me on April 3, 1891, I received notice that Mr. Stedman was in insolvency. I then took the note and agreement to, and consulted with, my attorney, and afterwards proved the note upon the usual blank in the Insolvency Court." It appeared that the defendant received a discharge in the insolvency proceedings. This is a suit in tort or contract, and the plaintiff has filed a special declaration setting forth the facts, and concluding with the averment that the defendant "wrongfully and fraudulently appropriated and converted to his own use and embezzled said sum," and a statement that "the defendant owes the plaintiff the sum of $1,706.59, as shown by said account annexed, as money had and received to her use, with interest thereon from the date of the writ." The account annexed charges the defendant with $1,152.50 and interest, and credits the defendant with the ten payments of $20 with interest.

"At the close of the evidence the defendant asked the court to rule that, on all the evidence, the defendant was entitled to a verdict. More specifically, that if the original indebtedness was a fiduciary one, the plaintiff lost the advantages of this character by accepting a note in settlement of the same. And also that, even although the debt were originally fiduciary, by the taking of the note under the circumstances shown, and the proving of it in the Insolvency Court as a claim against the defendant's estate, the plaintiff has lost any advantage arising from the original character of the indebtedness."

1. The plaintiff is not, as matter of law, barred from prosecuting this action by accepting the $20 enclosed in the letter of June 19, the two agreements of May 16, and nine instalments of $20 each paid under them.

Taking the letter of June 19 as a whole, it cannot be fairly held that the acceptance of the $20 sent in it, is an election by the plaintiff to hold the defendant liable to make restitution by transferring to her ten shares of the Chicago, Burlington, and Quincy stock, and by paying her the amount of the dividends declared thereon, until that stock should be handed to her,

Digitized by Google

and to relinquish her right to demand from the defendant the $1,152.50 with interest until repaid. Though the $20 is spoken of in that letter as "the dividend on 10 shares C. B. & Q.," the defendant in the same letter writes that he has tried to borrow the money unsuccessfully, and intends to try to borrow it, "but if not successful I must ask you to wait till I can earn enough to pay it back." It was not true that the $20 was the dividend on ten shares of the stock, but it was the equivalent thereof; nor was it true, as the defendant stated in the letter, that the plaintiff's money had been lost "waiting for the books to open." In short, taking the letter as a whole, the letter did not undertake to put the plaintiff to her election between these two courses of action, and the facts stated by the defendant in connection with the payment of the $20 in question were not true. She was entitled to much more than $20, and it cannot be said that in accepting the $20 enclosed in that letter she elected to take stock and barred herself from recovering the money paid.

Neither can it be held that the plaintiff has made such an election by accepting the written promises of May 16 and the nine instalments paid under them. The acceptance of these promises, and of the nine instalments of $20 each paid under them, are not inconsistent with the plaintiff's pursuing this action, unless the promises were taken in satisfaction of the original claim. A promise by a wrongdoer to make restitution is a promise to do what the law obliges him to do; the giving of such a promise does not of itself raise any presumption that it is taken in satisfaction of the original cause of action against the wrongdoer. It is because the giving of a non-negotiable promissory note in payment of a debt is nothing more than a promise to do what the law obliges the debtor to do that the rule is established that the giving of a non-negotiable promissory note is not *prima facie* payment of the debt for the amount of which the note is given. Shaw, C. J., in *Thurston* v. *Blanchard*, 22 Pick. 18, 21. *Earle* v. *Reed*, 10 Met. 387, 390. That the giving of a non-negotiable promissory note is not *prima facie* evidence of payment, see *Greenwood* v. *Curtis*, 4 Mass. 93; *Maneely* v. *M'Gee*, 6 Mass. 143, 145; *Greenwood* v. *Curtis*, 6 Mass. 358, 371; *Howland* v. *Coffin*, 9 Pick. 52.

Digitized by Google

It is open to the defendant in such a case to prove that there was in fact an agreement whereby the plaintiff agreed that the non-negotiable note should be and was taken in satisfaction of the debt due to him, and he may prove that such an agreement was made expressly by word of mouth, or impliedly by what took place at the time.

The promise in this case was little, if any, more than a promise of restitution; for though the restitution which would have been enforced at law was the payment of the $1,152.50 with interest, yet equity has a concurrent jurisdiction with law in case of a fraud, and the restitution enforced there is the making of the representation good in kind. In this case equity would have made a decree directing the defendant to buy for and deliver to the plaintiff ten shares of Chicago, Burlington, and Quincy stock. The defendant's promise in this case was a promise to pay the cost of the stock ($1,150), and until that was repaid to pay as interest $80 a year, payable quarterly, beginning on March 15, 1884; the $80 a year, payable quarterly, evidently was based upon the dividend which would accrue on ten shares of the stock in question, assuming that the rate of dividend continued unchanged. To this promise was added another, by which the defendant agreed to deliver ten shares of the stock within the year, with the proviso that the plaintiff was not bound to accept them in payment of the note. In other words, taking the two promises together as one, the promise was to make good the representation made by him, by delivering the stock, which he represented that he had bought, or by payment of the money it was represented to have cost, with the dividends which would be earned on that stock, giving the plaintiff the benefit of the assumption that the rate of dividend would continue unchanged; the option of taking the stock or the money being left to the plaintiff. That is practically a promise to make restitution. It is not so far different from a promise to make restitution as to make the acceptance of it, and of nine instalments of $20 each paid under its acts, inconsistent with the prosecution of this action, if the promises of May 16 were not in fact taken in satisfaction of the original cause of action.

In this case there was evidence that this promise was taken

Digitized by Google

in satisfaction, but on the evidence disclosed it was not, as matter of law, a satisfaction. In the case at bar it appeared that the promises signed by the defendant were in the handwriting of the plaintiff, copied by her from a draft prepared by Jenks; it did not directly appear that Jenks saw the defendant in behalf of the plaintiff; but as the plaintiff handed the defendant's letter announcing his failure and the loss of her money to Jenks, and Jenks prepared the draft of the promise which was ultimately given by the defendant, there was evidence that the promise was not voluntarily given, but was made at the plaintiff's request. This, coupled with the subsequent payment of ten instalments of interest, amounting to $20 each, and with the proof of the promise in insolvency, made it a question for the jury whether this promise of the defendant was taken in satisfaction by the plaintiff of her claim against him, founded on his fraud.

2. The plaintiff, by proving her claim in the insolvency proceedings, has not lost her right to sue the defendant in spite of his discharge in insolvency. Pub. Sts. c. 157, § 84, after providing that no debt created by fraud (*inter alia*) shall be discharged, contains the provision that "the dividend declared thereon shall be payment of so much of said debt or claim." The original act exempting from the operation of a discharge of a debt arising from defalcation by public officers and others standing in a fiduciary relation, provided that "the creditor thereto may prove the same, and the dividend declared thereon, shall be payment for so much of said claim." St. 1844, c. 178, § 3. That statute applied to defalcations by persons standing in a fiduciary relation, and did not include debts created by fraud; it was re-enacted in the General Statutes in substantially the language of the Pub. Sts. c. 157, § 84. See Gen. Sts. c. 118, § 79. By St. 1879, c. 245, § 5, that section of the General Statutes was amended by extending its provisions to "a debt created by fraud or embezzlement of the debtor." The statute, therefore, expressly provides that proof of the claim in insolvency shall not prevent the creditor from subsequently bringing a suit against the debtor in which his discharge shall not be a bar; and we are of opinion that, even if the testimony of the plaintiff is to be taken literally to mean that, in making her proof in



Digitized by Google

insolvency, she went on the note and not on the fraud, she is not thereby, as matter of law, to be taken to have waived the fraud.

The statements of this court in *Morse* v. *Lowell*, 7 Met. 152, 153, *Wolcott* v. *Hodge*, 15 Gray, 547, 548, and *Burpee* v. *Sparhawk*, 108 Mass. 111, 114, 115, (on which the defendant relies,) were made with respect to the right of a creditor to whom a debt was due from one in a fiduciary capacity to sue after the debtor had received a discharge under the United States bankrupt act of August 19, 1841, c. 9. In that act there is no provision allowing a creditor, to whom such a debt is due, to prove it without thereby waiving his rights as such creditor; in fact, there is no direct provision in that act that fiduciary debts should not be barred by a discharge, but the conclusion that they were not so barred was reached, as matter of construction, from a consideration of several different provisions of the act. See Story, J., in *In re Tebbetts*, 5 L. R. 259. In *Light* v. *Merriam*, 132 Mass. 283, 284, (the other case relied on by the defendant,) the negotiable promissory notes which were delivered were accepted as payment, and formal releases under seal were given, and the remarks of the court are to be taken as applying to those circumstances.

3. The exception to the admission of the testimony of the plaintiff, that, in taking the note and agreement, she had no intention or purpose of accepting them in settlement or in merger of the original cause of action for fraud, must be sustained. *Connecticut Trust & Safe Deposit Co.* v. *Melendy*, 119 Mass. 449, is really decisive of the point; for in that case it was decided (1) that where it is claimed that an agreement, the taking of which is not *prima facie* payment, was taken in satisfaction of the original cause of action, the issue is whether the parties made an agreement to that effect; and (2) that in such a case the intention of one party is not material. In that case suit was brought on a promissory note, and the defence was set up that the note sued on was paid by the giving of another note indorsed by the defendants, Warner, Hubbard, and Post; this note was given in Connecticut, a jurisdiction in which the giving of a promissory note is not *prima facie* a payment. The plaintiff asked the court to rule that unless the defendants, Warner, Hubbard, and Post, "intended to give their note in

Digitized by Google

payment of the note in suit, it would not be a payment." It was held that this request was rightly refused, on the ground that the issue before the jury was whether an agreement to take the note in payment had been made. In the case at bar, the issue before the jury was whether there was an agreement between the plaintiff and the defendant that the promises of the defendant of May 16, 1884, were taken in satisfaction of the plaintiff's claim against the defendant for his fraud; and on that issue it was not competent to put in evidence the undisclosed intention of the plaintiff not to accept the written promises of the defendant in satisfaction of her original claim. *Taft* v. *Dickinson*, 6 Allen, 553. *Scudder* v. *Bradbury*, 106 Mass. 422, 428. *Upton* v. *Sturbridge Cotton Mills*, 111 Mass. 446, 453, 454. *O'Donnell* v. *Clinton*, 145 Mass. 461, 463.

*Exceptions sustained.*

---

MARY A. DANAHY *vs.* JOHN A. NOONAN, trustee, & another.

Suffolk. March 19, 1900. — June 22, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

*Termination of Trust at Will of Cestui que trust.*

An active trust, requiring the exercise of discretion on the part of the trustee, is not to be terminated at the will of the *cestui que trust*.

BILL IN EQUITY, praying for the termination of a trust under the first clause of the will of James J. O'Brien, which is as follows: "All my property, real and personal, to my mother, Mary O'Brien, for the education and support of my daughter, Mary A. O'Brien." At the trial, before *Knowlton*, J., it appeared that Mary A. O'Brien, now Mary A. Danahy, and Edmund F. O'Brien were the only children of the testator, and that Edmund F. O'Brien had executed and delivered a deed of release to the plaintiff of all his interest, if any, under the will in and to the trust property. The judge reserved the case upon the pleadings and an agreed statement of facts for the consideration of the full court.

Digitized by Google

*J. L. Thorndike*, (*F. Rogers* with him,) for the plaintiff.

*J. A. Noonan*, for the defendants.

LATHROP, J. Whether Mary A. O'Brien took the whole equitable estate by the will or acquired it later by the conveyance from her brother of any interest that he might have in the trust property is immaterial. If her brother had any interest, it was subordinate to the trustee's right and duty to apply as much of the property as he deemed necessary to Mary A. O'Brien's support. The acquisition of her brother's interest did not affect this paramount right and duty. The trust is an active trust, requiring the exercise of discretion on the part of the trustee. Therefore it is not to be terminated at the will of the *cestui que trust*. *Claflin* v. *Claflin*, 149 Mass. 19. *Young* v. *Snow*, 167 Mass. 287. *Bill dismissed.*

---

## FANNIE CLARK *vs.* SUPREME COUNCIL OF THE ROYAL ARCANUM & others.

Suffolk. January 18, 1900. — July 2, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Fraternal Beneficiary Society — Death Benefit — Contention between Widow and Children of Former Wife.*

A bill in equity alleged that the plaintiff's husband had taken out a benefit certificate in a fraternal beneficiary society, in which the children of the husband by a former marriage were named as beneficiaries; that the husband promised the plaintiff to transfer the certificate to her; that subsequently, relying on the assurance that it had been transferred, she paid assessments on the certificate, from September 1, 1892, to January 30, 1899, to the amount of $330, and also at different times from June 5, 1892, to January 30, 1899, paid to him or on his account money to the amount of $5,000; that, under the laws of the society, the death benefit could have been made payable to her, and that the failure and neglect of her husband to make the certificate payable to her, and the statement that it was so payable, and the inducing her thereby to pay over to him and for his benefit the sum of $5,000, and to pay his dues and assessments, and to keep up his membership by making said payments, was a fraud upon her. The prayer was that the death benefit should be made payable to her, and that the society should pay to her the benefit fund, or that it might be decreed that the society or the other defendants should repay to her out of the fund the amount of assessments she had paid. *Held*, that the bill could not be maintained.

Digitized by Google

BILL IN EQUITY, by the widow of Louis H. Clark, against a fraternal beneficiary association incorporated under the laws of this Commonwealth and the children of said Louis H. Clark. The prayer was for an injunction restraining the society from paying out the benefit fund until it might be determined to whom it was payable, or that it should pay the same into court to await its further order; that it might be decreed that the death benefit should be made payable to the plaintiff, or that the society or said other defendants should repay to her out of the fund the amount of assessments she had paid. The defendants demurred, assigning as ground therefor want of equity. The case was reserved by *Lathrop*, J. for the consideration of the full court upon the bill and the demurrers thereto. If the demurrers were sustained, the bill was to be dismissed; otherwise it was to stand for hearing. The facts appear in the opinion.

The case was argued at the bar in January, 1900, and afterwards was submitted on briefs to all the justices.

*V. J. Loring*, (*S. B. White* with him,) for the plaintiff.

*J. H. Butler*, for the Supreme Council Royal Arcanum.

*F. B. Hemenway*, for the children of Louis H. Clark.

LATHROP, J. The plaintiff's husband, according to the bill, had taken out a benefit certificate in a fraternal beneficiary society, in which, as both sides assumed at the argument, the children of the husband by a former marriage were named as beneficiaries. Her husband promised the plaintiff to transfer this certificate to her. Subsequently, relying on the assurance that it had been transferred, she paid assessments on the certificate, from September 1, 1892, to January 30, 1899, to the amount of $330, and also at different times from June 5, 1892, to January 30, 1899, paid to him or on his account money to the amount of $5,000. The bill further alleges that, under the laws of the first named defendant, the death benefit could have been made payable to her, and that the failure and neglect of her husband to make the certificate payable to her, and the statement that it was so payable, and the inducing her thereby to pay over to him and for his benefit the sum of $5,000, and to pay his dues and assessments, and to keep up his membership by making said payments, was a fraud upon her. The bill prays that the death benefit shall be made payable to her, and

Digitized by Google

that the first-named defendant shall pay to her the benefit fund, or that it may be decreed that said defendant or the other defendants shall repay to her out of said fund the amount of assessments she has paid.

A majority of the court is of opinion that the bill cannot be maintained. So far as paying the assessments is concerned, it has been held that one who pays assessments at the request of the holder of a benefit certificate has no right in equity to have them repaid out of the fund. *United Order of the Golden Cross* v. *Merrick*, 163 Mass. 374. *Clarke* v. *Schwarzenberg*, 164 Mass. 347, 348.

Moreover, the policy of our law is that no contract shall be valid or legal which is conditioned upon an agreement or understanding that the beneficiary shall pay the dues or assessments, or either of them, for a member of a fraternal beneficiary corporation. Sts. 1888, c. 429, § 8; 1894, c. 367, § 8; 1898, c. 474, § 11. Apart from this, a death benefit fund is under our laws a peculiar species of property. It is not liable to attachment by trustee or other process, and cannot be seized, taken, appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named therein. Sts. 1888, c. 429, § 15; 1894, c. 367, § 14; 1898, c. 474, § 17.

It is also to be considered that the dues and assessments have not been contributed to the death fund which it is sought to reach in this case. These dues and assessments have been paid to raise funds which paid the death benefits of other members who died before the plaintiff's husband. The fund in controversy here is raised by the society from those members who survived the plaintiff's husband; and the society and its members are interested in having the fund applied, according to the terms of the benefit certificate, in bettering the condition of those dependents of the deceased member, to whom he and the society had agreed that it should go, in the only form known to the law. To give it to the plaintiff would be to divert a charitable fund from the specific purpose for which it was raised, to a purpose not in any aspect charitable, so that restitution might be made for the consequences of a fraud perpetrated upon the plaintiff by her husband.

Digitized by Google

So far as the plaintiff relies upon a contract made between her and her husband, it was invalid under our laws, and cannot be enforced in equity. *Fowle* v. *Torrey*, 135 Mass. 87, where this question was elaborately considered. See also *Woodward* v. *Spurr*, 141 Mass. 283; *Porter* v. *Wakefield*, 146 Mass. 25; *Clark* v. *Patterson*, 158 Mass. 388. Nor can the fact that the wife survived her husband make that a good contract which was originally a nullity. *Kneil* v. *Egleston*, 140 Mass. 202. Nor does the subsequent marriage of the wife to the member revoke or in any way affect the contract which he had made with the society. *Massachusetts Catholic Order of Foresters* v. *Callahan*, 146 Mass. 391.

As to the $5,000, there is less ground for impressing a trust upon the death fund. There is no allegation that the $5,000 lent to her husband by the plaintiff constituted any part of the fund. On the contrary, the allegation is that she paid the money to or on account of her husband. To impose a trust upon a fund, the money must be identified as going into the fund. See *Springfield Institution for Savings* v. *Copeland*, 160 Mass. 380.

It is suggested that what has taken place operates as an estoppel against the defendants in favor of the plaintiff. But there is no more reason why a person not named in a benefit certificate should be substituted for one named, by the operation of an estoppel than by the operation of a contract or a will. Yet it is well settled law in this Commonwealth that in such cases a benefit certificate cannot be transferred except in the manner pointed out in the by-laws of the society. *Elsey* v. *Odd Fellows' Mutual Relief Association*, 142 Mass. 224. *Daniels* v. *Pratt*, 143 Mass. 216. *McCarthy* v. *New England Order of Protection*, 153 Mass. 314.

Where, however, the society does not object, and the transfer is prevented by the fraud of the beneficiary named in the certificate already issued, equity may afford relief. *Marsh* v. *American Legion of Honor*, 149 Mass. 512.

The facts in the principal cases relied on by the plaintiff in argument differ essentially from those in the case at bar. In *Jory* v. *Supreme Council American Legion of Honor*, 105 Cal. 20, Mrs. Jory took out a certificate payable to her daughter upon her own death, and handed the certificate to her daughter.

Digitized by Google

Subsequently the mother desired to surrender the certificate and obtain another, in which her son was to be named as beneficiary. She attempted to obtain the old certificate from her daughter, but the daughter refused to give it up, and kept and concealed the same. The mother then took all the steps required by the laws of the beneficiary society to obtain a new certificate. The society declined to issue a new certificate until the old one was surrendered. On the death of the mother, the society brought a bill in equity against the son and the daughter to determine to whom the money belonged. The case was decided on the ground that as the mother had done all in her power to procure a new certificate, equity would consider that to be done which ought to have been done; but it was further said: "If the Legion of Honor was here as an aggressive party, insisting as against the claims of the son upon a strict compliance with its by-laws before it could be compelled to take money from its treasury, possibly a different question would be presented." Another ground upon which the case was put was the fraudulent conduct of the daughter in concealing the certificate; and it was said that she could not take advantage of her own wrong.

In the case at bar, the plaintiff took no step for over six years to ascertain whether her husband's representations were true or false, nor did she make any effort to procure a transfer from the company. The children named in the certificate are innocent parties, guilty of no fraud; and the society granting the certificate asserts its right that its laws shall be complied with.

In *Royal Arcanum* v. *Tracy*, 169 Ill. 123, a man borrowed a sum of money from his wife and took out a certificate in which she was named as beneficiary, which he gave her as security for the loan, and she retained it. Subsequently he made an affidavit that the certificate was lost, and obtained a new certificate naming other persons as the beneficiaries. It was held that the second certificate, having been obtained by fraud, could not prevail against the first certificate. It is to be noticed that under the statutes of Illinois, as construed by the court, a husband and wife may contract with each other except as to compensation for services. *Thomas* v. *Mueller*, 106 Ill. 36. *Crum* v. *Sawyer*, 132 Ill. 443. See also *Benard* v. *Grand Lodge of the*

Digitized by Google

*Ancient Order of United Workmen*, 13 So. Dak. 135, a case very similar to *Royal Arcanum* v. *Tracy*. These cases differ so widely from the case at bar that comment upon them is unnecessary.

We do not doubt that a wife may maintain a bill in equity against her husband in his lifetime to recover her separate property obtained from her by his fraud and coercion. *Frankel* v. *Frankel*, 173 Mass. 214. But the case at bar is not such a suit. The husband is dead, and her remedy, if any, is against his estate. As to whether she can maintain a bill in equity against the administrator we express no opinion, as this question is not before us. See *Houghton* v. *Butler*, 166 Mass. 547.

*Bill dismissed.*

---

## WILLIAM A. REED *vs.* SCHOOL COMMITTEE OF DEERFIELD & another.

Franklin. June 21, 1900. — July 18, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Election of Superintendent of Schools at Convention in Union District — Statute — Right of Convention at Adjourned Meeting to rescind Vote by Ballot at Previous Meeting.*

Although St. 1898, c. 466, providing that a certain class of towns may unite in the employment of a superintendent of schools, who is to be elected by ballot in a joint convention of the school committees of the towns comprising the union, intends that the members of the joint committee are to vote individually and not by towns, it cannot be said that a unanimous agreement made in such a convention composed of the school committees of towns, one of which has more members than either of the others, so to apportion the vote as to secure an equal representation for each town, is unlawful.

It is within the power of a joint convention of the school committees of towns uniting in the employment of a superintendent of schools, under St. 1898, c. 466, at an adjourned meeting, to rescind its vote for a superintendent of schools at the previous meeting, although the vote was by ballot, as required by the statute.

PETITION for a writ of mandamus to the school committee of the town of Deerfield, and to Chester M. Barton, commanding them not to interfere with the petitioner in the performance of

Digitized by Google

his duties as superintendent of schools in the district composed of the towns of Deerfield, Hatfield, and Leverett. Hearing before *Knowlton*, J., who reported the case for the consideration of the full court, in substance as follows.

The towns of Hatfield, Leverett, and Deerfield united for the purpose of employing a superintendent of schools under the provisions of St. 1898, c. 466. The school committees of the towns of Hatfield and Leverett consisted of three members each, and that of the town of Deerfield of three members until the year 1900, when by vote of the town the committee was increased to nine members.

In accordance with an arrangement duly made by the chairmen, the committees of the several towns met at Deerfield in joint convention on April 7, 1900. At this meeting thirteen members of the joint committee were present, three from Hatfield, three from Leverett, and seven from Deerfield. The convention organized by the choice of a chairman and secretary. For the purpose of equalizing the vote of the committee from Deerfield with the votes of the committees of the other towns, it was agreed without objection that the vote of each member present from Deerfield should count for a three-sevenths vote, giving the seven members from Deerfield together three votes, the same as the three members from each of the other towns, it being known that no other members of the committee from Deerfield could attend the convention on that day.

The names of Chester M. Barton and Frank Kennedy were presented as candidates for the office of superintendent of schools for the district. A formal ballot was then taken, and the tellers reported that Barton had received four and five-sevenths votes and Kennedy four and two-sevenths votes. Every member of the convention voted, seven voting for Barton, of whom three were from Hatfield and four from Deerfield, and six voting for Kennedy, of whom three were from Leverett and three from Deerfield.

A controversy arose over the question whether a person should be declared elected who had received only a fractional majority, and the chairman declared that there had been no election, and the meeting adjourned until April 21, 1900.

Barton had been elected and served as superintendent of

Digitized by Google

schools for the district for five consecutive years prior to 1900, and he continued to serve as such superintendent to the time of filing the petition in this case.

On April 21, 1900, an adjourned meeting of the convention was held, at which fourteen members of the several school committees were present, three from Hatfield, three from Leverett, and eight from Deerfield. It was then voted to rescind the vote at the previous meeting whereby the convention voted to elect a superintendent of schools, seven voting in the affirmative and six in the negative.

The convention then voted to proceed to the election of a superintendent of schools, and it was agreed unanimously that, in voting, each of the members from Hatfield and Leverett should have three votes, and each of those from Deerfield one vote, making possible twenty-seven votes if all were present. Of the Deerfield members eight only were present, making twenty-six votes in the convention.

A formal ballot was taken for superintendent of schools, and the petitioner received twelve votes and Barton eleven votes. The chairman declared the petitioner elected, and no objection was made thereto. Upon this ballot, thirteen votes were cast, seven members of the convention voting for Barton, of whom two were from Hatfield and five from Deerfield, and six voting for the petitioner, of whom three were from Leverett and three from Deerfield, and one member cast a blank ballot.

The petitioner was informed of his election as superintendent of schools, and he accepted the position; and the secretary of the convention subsequently forwarded to him a notification of his election.

On April 26, 1900, the petitioner began the discharge of his duties, but on May 7, 1900, he received a notice from the Deerfield committee that they should recognize Barton as superintendent.

The case was submitted on briefs to all the justices.

*S. D. Conant*, for the respondents.

*D. Malone*, for the petitioner.

HOLMES, C. J. The members of the joint committee provided by St. 1898, c. 466, no doubt are intended to vote individually, and not by towns. At the same time, as town interests

Digitized by Google

are concerned, it is at least consistent with the statute that the members should be at liberty, by unanimous consent, to secure an equal representation for each town. The number of which a school committee shall consist is left to the will of the town, (Pub. Sts. c. 44, § 21,) and it might be unjust that the representatives of a town with a school committee of nine should count for more on the joint committee than those of another town with a school committee of three.

It is true that the statute requires the superintendent of schools to be chosen by ballot, and that if votes are so far identified as to make it possible to give them different values according to the town from which the voter comes, the secrecy of the ballot, if secrecy is intended, is impaired so far. But the remote implications of the provision for the ballot are at least balanced by the considerations in favor of equality, of which we have spoken.

At the first meeting the equality agreed upon was an equality between the committees actually present. At the adjourned meeting the equality was an equality between the total committees. At the first meeting it was known that the absent members could not be present. Whether this was or was not the fact at the adjourned meeting does not appear. We cannot say that the agreements as to the numerical value of the votes were not both of them lawful and proper.

It follows that the respondent Barton was elected at the first meeting, and should have been declared elected by the chair. The chairman, however, declared that there was no election, and the meeting adjourned. At the adjourned meeting, (which was a continuation of the same meeting, *Attorney General* v. *Simonds*, 111 Mass. 256, 258,) it was voted "to rescind the vote at the previous meeting whereby the convention voted to elect a superintendent of schools," and this vote is treated by both sides as a rescission of the election, if that was within the power of the meeting.

We are of opinion that it was within the power of the meeting to rescind its vote. The case is like *Wood* v. *Cutter*, 138 Mass. 149, except that here the statute required the voting to be by ballot. But the statute made the same requirement in *Baker* v. *Cushman*, 127 Mass. 105, and the language of Chief

Digitized by Google

Justice Gray in that case is applicable to this. See also *State* v. *Foster*, 2 Halst. 101. In view of these decisions further discussion is unnecesary.

Upon the facts stated in the report it follows from what we have said that the petitioner is entitled to the office.

*Writ to issue.*

---

JOHN B. FITZPATRICK *vs.* DELIA S. GILSON.

Suffolk. November 13, 1899. — September 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Broker's Commission — Finding — Action — Defect in Title — Written Application for Loan.*

The contention that a broker who was employed "to procure a loan" does not earn his commission unless the money to be borrowed is actually paid over, or a valid contract is made by which the customer procured by the broker agrees to lend the money, and that this applies to a case where the loan is not made, because, by reason of the defect in his title, the borrower is not able to give the mortgage he stipulated to give to the customer procured by the broker, is unsound. If there is evidence which would warrant a jury in finding that the plaintiff found a customer accepted by the defendant who was able, ready, and willing to make the loan, and the jury so find, the plaintiff is entitled to recover; and it is immaterial that the defendant's written application to a savings bank for a loan contains the provisions "that the said title will not be deemed to be satisfactory if the estate is held subject to any condition," and that the defendant is to "pay a commission of two per cent."

CONTRACT, to recover a broker's commission. Trial in the Superior Court, before *Sheldon*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

*J. E. Crowley*, for the plaintiff.

*L. R. Wentworth*, for the defendant.

LORING, J. In this case the presiding justice ruled that on the evidence the defendant was entitled to a verdict, and reported the case to this court. By the terms of the report judgment is to be entered for the plaintiff for $108, and interest from the date of the writ, "if the jury would have been warranted in

Digitized by Google

finding for the plaintiff." We are of opinion that there was evidence that would have warranted such a finding.

The defendant's first contention is that a broker who is employed "to procure a loan" does not earn his commission unless the money to be borrowed is actually paid over, or a valid contract is made by which the customer procured by the broker agrees to lend the money; and that this applies to a case where (as in the case at bar) the loan is not made, because, by reason of a defect in her title, the borrower is not able to give the mortgage she stipulated to give to the customer procured by the broker.

We are of opinion that this contention is not correct.

The duty which a broker is employed to perform is to find a customer for that for which his principal directs him to find a customer; in the case at bar, for a loan to be made by the customer, secured by a first mortgage on a specified lot of land, to be made by the principal. The broker found a customer ready to make that loan, and the transaction fell through because the defendant, the broker's principal, did not have a good title to the land in question, that is to say, because of the principal's inability to produce that for which he employed the broker to get him a customer.

When a broker has found a customer for that for which his principal has employed him to find a customer, the broker has performed his duty and has earned his commission, or, as the proposition is usually stated, if the person produced by the broker is able, ready, and willing to buy, sell, or lend, as the case may be, the broker's commission is earned. *McGavock* v. *Woodlief*, 20 How. 221, 222. *Green* v. *Lucas*, 33 L. T. (N. S.) 584, 587. *Middleton* v. *Thompson*, 163 Penn. St. 112. *Sibbald* v. *Bethlehem Iron Co.* 83 N. Y. 378, 383, 384. *Duclos* v. *Cunningham*, 102 N. Y. 678. *Fischer* v. *Bell*, 91 Ind. 243. *Vinton* v. *Baldwin*, 88 Ind. 104, 105. *Peet* v. *Sherwood*, 43 Minn. 447, 448. *Cheatham* v. *Yarbrough*, 90 Tenn. 77. *Budd* v. *Zoller*, 52 Mo. 238, 242, 245. *Buckingham* v. *Harris*, 10 Col. 455.

When the broker has produced a customer, his duty is at an end; so far as his rights, or his duty, are concerned, it is immaterial whether a contract is, or is not, made, or, if made, whether it is, or is not, performed. The broker's right to a commission is no more dependent upon, or affected by, the fact that a contract

Digitized by Google

is, or is not, drawn up and executed, than it is by the fact that the contract, if drawn up, is, or is not, carried into effect. Making or not making a contract with the customer produced, enforcing or not enforcing a contract, if made, are matters for the broker's principal to do or not to do, as his ability and inclination determine; they are matters with which the broker is not concerned, and on which his right to a commission is not dependent.

That it is no part of a broker's duty to draw up and see to the execution of a contract between his principal and the customer produced by him is settled. See *Cook* v. *Welch*, 9 Allen, 350; *Desmond* v. *Stebbins*, 140 Mass. 339, 342; *Middleton* v. *Thompson*, 163 Penn. St. 112; *Keys* v. *Johnson*, 68 Penn. St. 42, 43; *Duclos* v. *Cunningham*, 102 N. Y. 678.

That a broker's right to a commission is not defeated if a contract is made and not carried out by reason of his principal's inability to perform, see *Green* v. *Lucas*, 33 L. T. (N. S.) 584; *Sweeney* v. *Ten Mile Oil & Gas Co.* 130 Penn. St. 193; *Middleton* v. *Thompson*, 163 Penn. St. 112; *Holly* v. *Gosling*, 3 E. D. Smith, (N. Y.) 262; *Peet* v. *Sherwood*, 43 Minn. 447; *Cheatham* v. *Yarbrough*, 90 Tenn. 79.

The cases of *Holden* v. *Starks*, 159 Mass. 503, *Witherell* v. *Murphy*, 147 Mass. 417, and *Washburn* v. *Bradley*, 169 Mass. 86, are inconsistent with any other view. In *Holden* v. *Starks* it was held that the broker earned his commission when an oral agreement for the sale of land was made, which could not be enforced by reason of the statute of frauds. In *Witherell* v. *Murphy* it was held that a broker, employed to find a purchaser on terms stated by his principal at the time of his employment, was entitled to his commission, when he procured a customer who was able, ready, and willing to buy on the terms stated, though no contract was actually made, because the broker's principal refused to stand by his offer when it was communicated to him. To the same effect see *Fischer* v. *Bell*, 91 Ind. 243; *Buckingham* v. *Harris*, 10 Col. 455; *Kock* v. *Emmerling*, 22 How. 69; *Moses* v. *Bierling*, 31 N. Y. 462; *Vinton* v. *Baldwin*, 88 Ind. 104. It is true that in *Witherell* v. *Murphy* the broker wrote out a contract and delivered it to the customer; but the writing out of that contract at the time when it was written out, namely, after the principal had refused to stand by his offer, could not enlarge

Digitized by Google

the plaintiff's rights to a commission. In *Washburn* v. *Bradley*, where a broker was employed to get a person to take the defendant's lease off his hands, and the broker procured a person who covenanted to do so, but who refused to do so because of misrepresentations of the defendant, the broker's principal, the making of the contract did not add to the benefits secured to the principal by the services of the broker. Had the customer discovered the misrepresentations after the terms had been agreed to, and one minute before the contract was signed, the broker would have been entitled to his commission; in both instances the trade fails by reason of the principal's default.

In the case at bar there was evidence that a copy of the defendant's written application for a loan of $6,000 was submitted to the Cambridge Savings Bank by the plaintiff, the broker employed by the defendant; that the treasurer of the savings bank wrote to the plaintiff: "Our board of investment has examined the estate. . . . The board value it at $9,000, and are willing to loan $5,400;" (this letter was admitted without objection;) that the plaintiff showed this letter to the defendant, who thereupon indorsed on the original application: "I hereby agree to accept a loan of $5,400 on my property on Gilson Terrace, Somerville, to be made by the Cambridge Savings Bank"; "that the Cambridge Savings Bank then referred the defendant's title to their attorney, and that he reported that the title was not good"; and "that upon this adverse report the bank declined to make the loan." On this evidence the jury would have been warranted in finding that the Cambridge Savings Bank was ready and willing to lend $5,400 on the land described; that the loan was not made because of the defendant's inability to give a good mortgage on that land, and that the defendant accepted the Cambridge Savings Bank as able to make the loan, and accepted $5,400 in place of $6,000 as the amount to be borrowed, by the indorsement on the original application. This evidence warranted a finding for the plaintiff, though by reason of a failure on the part of the plaintiff to prove that St. 1894, c. 317, § 21, had been complied with, he had failed to show that the savings bank ever made a valid and binding agreement to lend the money.

The defendant's second contention is that whatever the general rule may be, it was stipulated in this case that the broker

Digitized by Google

was not to earn his commission unless the loan was actually made; and the provision in the defendant's application for a loan, "that said title will not be deemed to be satisfactory if the estate is held subject to any condition," is relied on as a stipulation to that effect. It would be enough to dispose of this clause to state that there is nothing to show that the defect, on which the adverse report of the attorney of the savings bank was founded, was that the estate was held subject to a condition. But it is more satisfactory to dispose of the objection on broader grounds. It is plain that this clause cannot be construed to be a stipulation to the effect contended for; it evidently was inserted in the written application that there might be no misunderstanding as to what it was, for which a customer was to be procured, and was not inserted to stipulate that the general rule should not obtain as to what the broker must do to earn his commission. The fact that in the written application it is stated that the defendant is to "pay a commission of two per cent" is not significant; that statement is part of a statement inserted in the application of what expenses are to be paid by the principal, and evidently was included in that statement to prevent a misunderstanding, which might have arisen had it been left out; to prevent the principal being led to think that she was not to pay a commission, because a statement was made of the expenses she was to be at in the matter, and no mention was then made of any commission. The including of this statement as to a commission in the statement of the expenses the defendant was to be at in the matter, cannot be held to convert what purports to be, and is, a written application for a loan, into a special stipulation that in this case the broker should not be entitled to a commission in accordance with the general rule.

The entry must be,

*Judgment for the plaintiff for $108, and interest from the date of the writ.*



Digitized by Google

MARY P. BOOMER *vs.* JOSEPHUS W. L. WILBUR & another.

Bristol. December 14, 1899. — September 4, 1900.

Present: HOLMES, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Personal Injuries — Fall of Bricks from Building — Contractor and Contractee — Negligence — Instructions — Evidence — Exercise of Discretion by Presiding Justice.*

If, in an action for personal injuries occasioned to the plaintiff while passing on the sidewalk by the fall of bricks from a chimney on the house of the defendant, it appears that the relation between the defendant and the contractor employed in repairing the chimney was that of contractor and contractee, instructions to the jury which allow them to find a verdict for the plaintiff, not upon the ground that the chimney was a nuisance "likely to do mischief," but upon the ground that the work of repair called for by the contract was necessarily a nuisance within the rule stated in *Woodman* v. *Metropolitan Railroad*, 149 Mass. 335, are incorrect; and the defendant is not answerable for the negligence of the contractor.

In an action for personal injuries occasioned to the plaintiff while passing on the sidewalk by the fall of bricks from a chimney on the house of the defendant, which chimney a contractor was employed in repairing, a circular handed to the defendant by the contractor when the contract was made representing his business competency and experience, and including a cut of the staging used by him, is rightly excluded, his competency, even if material, not being in dispute, and the kind of staging he advertised to use being immaterial; and the exclusion of questions with reference to prior ailments of the plaintiff is within the discretion of the court.

TORT, for personal injuries occasioned to the plaintiff by the fall of brick and mortar from a chimney on the house of the defendants in Taunton upon the plaintiff while she was passing below on the sidewalk. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, which appear in the opinion.

*L. E. White*, for the defendants.

*H. J. Fuller*, for the plaintiff.

HAMMOND, J. The court instructed the jury in substance that where, under a contract between the owner of a house and the person doing the work, work is done upon the house, and the owner retains the right of access to and the control of the premises, and such work is ordinarily attended with danger to the public unless proper precautions are taken to avoid it, the owner

Digitized by Google

is bound to the exercise of due care to see that such precautions are taken for the safety of the public; and if by reason of the failure to take such precautions a person lawfully on the street and in the exercise of due care is injured, the owner is answerable notwithstanding the work is being done under a contract between him and the contractor.

Having stated this as a general rule, the court applied it to this case as follows: "If the defendants employed a person to repair the chimneys on their buildings adjoining the highway under the contract, to repair them for a fixed sum, and the defendants retained the right, retained control, and the right of access to the building, and such work on the chimneys would ordinarily be attended with danger to the public unless proper precautions to avoid it were taken, the defendants were bound to take proper precautions, or to see that proper precautions were taken, for the safety of the public; and if the plaintiff was injured while she was lawfully on the street, adjoining the defendants' premises, and in the exercise of due care, by reason of the failure of the defendants to take proper precautions, or by reason of their failure to see that proper precautions were taken, to avoid such injury, then the defendants are liable for the injury."

We understand these instructions to mean that, even if the defendants employed a competent, independent contractor to repair these chimneys, who was to do the work without any dictation or supervision on the part of the defendants over the details of the work or the manner in which it should be done, the defendants would be answerable for the failure of the contractor to take proper precautions to protect travellers upon the highway from falling bricks.

While the master is liable for the negligence of the servant, yet when the person employed is engaged under an entire contract for a gross sum in an independent operation, and is not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but as that of contractor and contractee; and in such case the general rule is that the negligence of the contracting party cannot be charged upon him for whom the work is to be done; and this rule is applicable even where the owner of the land is the person who hires the

Digitized by Google

contractor, and for whose benefit the work is done. *Hilliard* v. *Richardson*, 3 Gray, 349. *Forsyth* v. *Hooper*, 11 Allen, 419. *Conners* v. *Hennessey*, 112 Mass. 96. *Harding* v. *Boston*, 163 Mass. 14, 18. There are, however, some well known exceptions to the rule. If the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, and if the contract cannot be performed except under the right of the employer who retains the right of access, the law may hold the employer answerable for negligence in the performance of the work.

*Woodman* v. *Metropolitan Railroad*, 149 Mass. 335, was such a case, and the defendant was held liable for the act of an independent contractor hired by it to dig up and obstruct the streets for the purpose of laying down the track, upon the ground that the contract called for an obstruction to the highway which necessarily would be a nuisance unless properly guarded against.

The same principle is further illustrated in *Curtis* v. *Kiley*, 153 Mass. 123, and *Thompson* v. *Lowell, Lawrence, & Haverhill Street Railway*, 170 Mass. 577.

Again, if the contract calls for the construction of a nuisance upon the land of the employer, he may be held answerable for the consequences. In *Gorham* v. *Gross*, 125 Mass. 232, the defendant had caused to be constructed by an independent contractor a party wall, half on the defendant's land and half upon adjoining land, and after it was completed and accepted it fell, causing damage to the property of the adjoining landowner. There was evidence that the fall of the wall was occasioned by negligence in its construction. The court said that the wall as constructed was a nuisance "likely to do mischief," and held the defendant answerable for the damage caused by its fall.

To the same effect is *Cork* v. *Blossom*, 162 Mass. 330.

The instructions to the jury allowed them to find a verdict for the plaintiff, not upon the ground that the chimney was a nuisance "likely to do mischief," but upon the ground that the work of repair called for by the contract was necessarily a nuisance within the rule stated in *Woodman* v. *Metropolitan Railroad*, *ubi supra*, and other similar cases.

The work called for was the repair of chimneys. At most the brick were to be taken off for a few feet and relaid. The work

Digitized by Google

which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons travelling therein. It is plain that unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveller. The case very much resembles *Pye* v. *Faxon*, 156 Mass. 471. The plaintiff in that case, being the tenant of a house, sued the owner of an adjoining lot for trespasses alleged to have been committed upon the plaintiff's estate by the defendant while engaged in constructing a large building on his lot. It appeared from the testimony that the wall next to the plaintiff's house was not built on the boundary line, but was several inches from it, and that the staging used in building it was placed upon the inside; that the brick when laid pressed out the mortar, which was then scraped off by the trowels of the masons, and some of it dropped upon the plaintiff's land, upon her rear windows, and upon the clothes hanging in her back yard. At the trial the presiding judge instructed the jury that if the dropping of the mortar was from the carelessness of the workman the defendant was not liable, but if it was something necessarily involved in the building of the wall, then he might be liable; and these instructions were held to be correct.

This is not a case where the work, even if properly done, creates a peril, unless guarded against, as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public.

The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held. The case is clearly distinguishable from *Woodman* v. *Metropolitan Railroad*, *ubi supra*, and others of a like character, and must be classed with *Conners* v. *Hennessey*, *ubi supra*, and others like it.

Digitized by Google

Smith's circular was properly excluded. His competency, even if it was material, was not in dispute, and the kind of staging he advertised to use was immaterial.*

The exclusion of the questions with reference to the prior ailments of the plaintiff was within the discretion of the court. The physician who had treated her for them testified that he did not think there was any reason to believe that they were in any way connected with her condition after the accident; and although, as stated by the counsel for the defendant, that might not be the opinion of another physician who was present at the suggestion of the defendant, to hear the evidence, and, although in accordance with experience in such matters very likely it would not be, still the court may have concluded that he could not assume this contradiction in the expert testimony until it actually occurred, and that upon the evidence before him he was justified in looking at the prior ailments as in no way connected with her condition at the trial, and therefore immaterial. It does not appear that in this there was error.

*Exceptions sustained.*

---

## BARNEY CLINTON *vs.* NORFOLK MUTUAL FIRE INSURANCE COMPANY.

Norfolk. January 23, 1900. — September 4, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Validity of Fire Insurance Policy as to Life Interest remaining after a Sale of the Fee — Breach of Condition — Alienation — Action.*

A sale and conveyance of real estate "reserving, however, to myself during my life, the dwelling-house on said parcel, together with one acre of land surrounding said dwelling-house, but not including in said acre the land on which the barn

* Smith was asked by the defendants' counsel if he handed to the defendants, when the contract was made, a circular representing his business, his business qualifications, his experience, and his whole method of doing business as an expert chimney builder, including a cut of the staging used by him, and he said that he did. The circular was then offered by the defendants and excluded, on the objection of the plaintiff, and the defendants excepted.

Digitized by Google

stands," is not a breach of the condition of a policy of insurance against loss by fire, which contains clauses which provide that it shall be void if, without the consent of the defendant, "the situation, or circumstances affecting the risk, shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks," or "the said property shall be sold"; and the policy is valid as to the interest remaining in the insured at the time of the loss.

CONTRACT, upon a policy of insurance. Writ dated February 10, 1897. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

On and before January 1, 1894, the plaintiff was the owner in fee of a certain parcel of real estate, consisting of land containing thirty-one acres and four rods, with a dwelling-house and barn thereon, in Canton. On said January 1, he made written application for, and the defendant company issued to him, a policy, whereby it insured the dwelling-house and barn against loss by fire in the sum of $1,200, apportioned as follows: $800 on the house and $400 on the barn. The policy provided that it should be void if, without the consent of the defendant, "the situation, or circumstances affecting the risk, shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks," or "the said property shall be sold." On June 24, 1896, the plaintiff, who was seventy-six years of age, conveyed said real estate to one Forbes, by deed, "reserving, however, to myself during my life, the dwelling-house on said parcel, together with one acre of land surrounding said dwelling-house, but not including in said acre the land on which the barn stands." No notice was given to the defendant company of this transfer, and the company had no knowledge thereof until after the loss hereinafter described, and never assented to the transfer. The barn referred to in the deed is the barn insured by the policy, and, at its nearest point, is about fifty feet from the dwelling-house. On August 28, 1896, the dwelling-house, while occupied by the plaintiff as a life tenant, by virtue of the reservation in the deed, was totally destroyed by fire, and due notice of the loss was given to the defendant. The value of the life interest of the plaintiff in the dwelling-house at the time of the loss was $148.80. If the plaintiff was entitled to recover to the extent of his ownership and interest

Digitized by Google

in the dwelling-house at the date of issuing the policy, judgment was to be entered for him in the sum of $800.

*T. E. Grover*, for the plaintiff.

*Asa P. French*, for the defendant.

HAMMOND, J. By his deed to Forbes the plaintiff conveyed all his interest in the buildings insured except an estate for his life in the house. This life estate was carved out of the fee previously owned by him, and was held by the same title as before the conveyance. He sold his entire interest in the barn, but only part of his interest in the house. The only question is whether the policy was thereby avoided as to his remaining interest in the house.

The defendant contends that the policy is thus avoided, and relies upon the clauses which provide that it shall be void if, without the consent of the defendant, "the situation, or circumstances affecting the risk, shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks," or "the said property shall be sold."

So far as respects the change of circumstances or situation, nothing appears except the deed to Forbes. The burden of proof to show a breach of condition of a policy which has once attached is on the defendant, *Orrell* v. *Hampden Ins. Co.* 13 Gray, 431; and even if the clause has reference to what are sometimes called the moral elements of the risk, we cannot say, upon the facts appearing before us, that the risk was increased by the sale, or that the clause was intended to embrace the changes made by a sale, especially when there is an express provision in the policy relating to that subject. *Powers* v. *Guardian Ins. Co.* 136 Mass. 108. Compare also *Oakes* v. *Manufacturers' Ins. Co.* 131 Mass. 164.

The defence must, therefore, rest upon the clause as to alienation. Many of the earlier policies of fire insurance contained no condition against alienation. Inasmuch, however, as the contract of insurance is one of indemnity and not a wager, it is manifest that where, before the fire, the insured had parted with his entire interest in the property insured, he suffered no loss by its destruction and needed no indemnity. A total transfer of his interest, therefore, defeated the policy. But any change short of a complete transfer of his entire interest did not have that

Digitized by Google

effect. The general rule was and is that, in the absence of any provision to the contrary in the policy, any change in the insurable interest of the insured, whether by a complete sale of only a part of the property, or a change in the title to a part or the whole of the property, does not avoid the policy which has once attached, provided that at the time of the loss the insured has an insurable interest. It is necessary that there should be an insurable interest at the time of the contract and at the time of the loss, but if at the time of the loss the insured has parted with only a part of his interest, the policy is valid as to the part retained. *Lazarus* v. *Commonwealth Ins. Co.* 5 Pick. 76. *Scanlon* v. *Union Ins. Co.* 4 Biss. 511. *Cowan* v. *Iowa State Ins. Co.* 40 Iowa, 551. *Stetson* v. *Massachusetts Ins. Co.* 4 Mass. 330. *Ayres* v. *Hartford Ins. Co.* 17 Iowa, 176. *Hitchcock* v. *Northwestern Ins. Co.* 26 N. Y. 68. And see further the cases cited in 13 Am. & Eng. Encyc. of Law, (2d ed.) 240, and notes. And even a total alienation does not avoid, but only suspends the policy, so that if the insured regains his interest or any part of it, and holds it at the time of the loss, he may recover. May, Ins. § 101. *Worthington* v. *Bearse*, 12 Allen, 382.

In this state of the law insurers began to insert in the policies clauses relating to alienation. These clauses vary in language, and in the examination of the cases on this subject considerable care must be exercised in order to discriminate properly between those cases applicable and those not applicable to the clause which may be under consideration.

The clause in this policy is if "the said property shall be sold." Conditions of this kind are strictly construed against the insurer, and the general rule is that such a condition refers only to an absolute transfer of the entire interest of the insured, completely divesting him of his insurable interest. Any sale or transfer short of this is not within the scope of the condition. See, in addition to the cases above cited, *Bryan* v. *Traders' Ins. Co.* 145 Mass. 389; *Holbrook* v. *American Ins. Co.* 1 Curtis C. C. 193; *Power* v. *Ocean Ins. Co.* 19 La. 28; and the cases collected in 13 Am. & Eng. Encyc. of Law, (2d ed.) 241, and notes.

If it be the intention of the insurers that the contract should be avoided by any partial sale, or by any change short of an absolute sale of the entire interest, there is no difficulty in

Digitized by Google

expressing that intent in plain and explicit language, and in many policies such an intention is thus expressed. See *Oakes* v. *Manufacturers' Ins. Co.*, *ubi supra*, where the condition was that the policy should be void if the property insured should be sold or conveyed in whole or in part.

As an illustration of the different results arising from the difference in the language of the clauses as to alienation compare the case of *Foote* v. *Hartford Ins. Co.* 119 Mass. 259, and *Bryan* v. *Traders' Ins. Co.*, *ubi supra*. In the former case, where the condition was that the policy should be void if any change should take place in the title or possession of the property insured, whether by sale, transfer, or conveyance, legal process or judicial decree, it was held that a mortgage by way of an absolute deed and an unrecorded instrument of defeasance back was a violation of the condition, while in the latter case it was held that such a mortgage did not avoid the policy where the condition was that the policy should be avoided if "the said property shall be sold."

If, therefore, the house had been the only building named in the policy, or if the policy can be regarded as containing two separate and independent contracts, one applicable to the house alone, and one applicable to the barn alone, there was no breach of the condition of alienation so far as respects the house, and the policy was valid as to the life estate of the plaintiff therein at the time of the loss. *Clark* v. *New England Ins. Co.* 6 Cush. 342.

But it is contended by the defendant that the contract was entire, and that being void as to the barn it is void as to the house. And the counsel for the defendant argues that, in so far as the case of *Clark* v. *New England Ins. Co.*, *ubi supra*, seems to support the doctrine that where the different articles are separately valued in a policy it is to be regarded as containing a separate, distinct, and independent contract as to each such article, as though each was insured in a separate policy, it is inconsistent with *Brown* v. *People's Ins. Co.* 11 Cush. 280, and *Thomas* v. *Commercial Union Assurance Co.* 162 Mass. 29, and other similar cases decided here and elsewhere. We have not found it necessary, however, to consider whether or not the contract in this case is an entire contract, since we are of the

Digitized by Google

opinion that, even if it be entire, there has been no breach of the condition. If the contract was entire, then the house and barn were insured as one entire risk, and the same considerations which lead to the conclusion that where the house is the only building insured there is no sale within the condition named in the policy, when the insured retains an insurable interest in the house, leads also to the conclusion that where the house and barn are insured as one entire risk there is no sale of the property within the condition when the insured retains an insurable interest in either building. In either case there has not been an absolute sale of the entire interest in the whole property, and consequently no breach of the condition. And the reason the plaintiff cannot recover for the destruction of the barn is not because there has been a breach of the condition as to alienation, and the policy has therefore become void, but because he had no insurable interest in the barn when it was burned, and has therefore suffered no loss by its destruction. The result would be the same even if there was no condition whatever as to alienation, or if the plaintiff had lost his interest in some way not covered by the condition.

It is true that often the condition in a policy covering several buildings which is regarded as an entire contract is broken when trouble arises as to one building alone, or even a part of one. In *Thomas* v. *Commercial Assurance Co.*, *ubi supra*, for instance, it was held that a misdescription as to one of the buildings covered by one entire contract was a misdescription of the property insured, and the policy was held void as to all the buildings. Of course the description of the whole property covered by the risk could not be correct, so long as it was incorrect as to any particular building; and the principle of this decision is of very general application in the law of insurance, whether the policy be avoided for a breach of a condition or for fraud, or other cause applicable to contracts in general. *Brown* v. *People's Ins. Co.*, *ubi supra.*

On the other hand, in *McQueeny* v. *Phœnix Ins. Co.* 52 Ark. 257, where the policy covered two buildings, and contained a provision that it should be void if the premises should become vacant or unoccupied, and it appeared that at the time of the fire one of the buildings only was occupied, it was held that the

Digitized by Google

contract and risk were entire, and therefore the premises could not be regarded as unoccupied so long as one of the buildings was occupied, and there was no reason why the plaintiff should not recover for the loss of both.

These two classes of decisions are perfectly consistent with each other. The last case somewhat resembles in principle the case at bar. Since in this case there has been no breach of the condition of the policy, the plaintiff may recover the value of his life interest at the time of his loss, which by the agreement of the parties was $148.80, with interest from the date of the writ. *Judgment for the plaintiff accordingly.*

---

PAUL J. PLANT & others *vs.* HENRY K. WOODS & others.

Hampden. September 26, 1899. — September 5, 1900.

Present: HOLMES, C. J., KNOWLTON, LATHROP, HAMMOND, & LORING, JJ.

*Conspiracy by Members of Labor Union to compel others to join Union — Coercion and Intimidation by Threats to Employers of Strikes and Boycotts — Equity — Injunction.*

If the members of one labor union conspire to compel the members of another union of the same craft to join the former union, from which they have withdrawn, and to carry out their purpose threaten strikes and boycotts to induce the employers of the members of the latter union either to get them to ask for reinstatement in the former union, or, failing so to do, then to discharge them, although no acts of personal violence or of physical injury to property are committed, such conspiracy and the acts in pursuance of it are unlawful, and having caused, and being likely still further to cause, injury, equity will restrain the actors by injunction. HOLMES, C. J., dissenting.

BILL IN EQUITY, filed in the Superior Court, by the officers and members "of the voluntary association known as Union 257, Painters and Decorators of America of Springfield, Massachusetts, which Union is affiliated with a national organization of the same name, with headquarters at Lafayette in the State of Indiana," against the officers and members "of the voluntary association known as Union 257, Painters and Decorators of America, which Union is affiliated with a national organization

Digitized by Google

of the same name, with headquarters at Baltimore in the State of Maryland," to restrain the defendants from any acts or the use of any methods tending to prevent the members of the plaintiff association from securing employment or continuing in their employment. Hearing before *Dewey*, J., who entered the following decree:

"This cause came on to be heard, and was argued by counsel; and thereupon, on consideration thereof, it is ordered, adjudged, and decreed that the defendant association, the defendants, and each and every of them, their committees, agents, and servants, be restrained and strictly enjoined from interfering and from combining, conspiring, or attempting to interfere, with the employment of members of the plaintiffs' said association, by representing or causing to be represented in express or implied terms, to any employer of said members of plaintiffs' association, or to any person or persons or corporation who might become employers of any of the plaintiffs, that such employers will suffer or are likely to suffer some loss or trouble in their business for employing or continuing to employ said members of plaintiffs' said association; or by representing, directly or indirectly, for the purpose of interfering with the employment of members of the plaintiffs' said association, to any who have contracts or may have contracts for services to be performed by employers of members of plaintiffs' said association, that such persons will or are likely to suffer some loss or trouble in their business for allowing such employers of members of plaintiffs' said association (and because they are such employers) to obtain or perform such contracts; or by intimidating, or attempting to intimidate, by threats, direct or indirect, express or implied, of loss or trouble in business, or otherwise, any person or persons or corporation who now are employing or may hereafter employ or desire to employ any of the members of the plaintiffs' said association; or by attempting by any scheme or conspiracy, among themselves or with others, to annoy, hinder, or interfere with, or prevent any person or persons or corporation from employing or continuing to employ a member or members of plaintiffs' said association; or by causing, or attempting to cause, any person to discriminate against any employer of members of plaintiffs' said association (because he is such employer) in giving or allow-

Digitized by Google

ing the performance of contracts to or by such employer; and from any and all acts, or the use of any methods, which by putting or attempting to put any person or persons or corporation in fear of loss or trouble, will tend to hinder, impede, or obstruct members, or any member, of the plaintiffs' said association from securing employment or continuing in employment. And that the plaintiffs recover their costs, taxed as in an action of law."

The case was reported, at the request of both parties, for the determination of this court. The facts appear in the opinion.

*W. R. Heady*, (*J. W. Flannery* with him,) for the plaintiffs.

*W. H. McClintock*, (*J. B. Carroll* with him,) for the defendants.

HAMMOND, J. This case arises out of a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws. The chief difference between them is that the plaintiff union is affiliated with a national organization having its headquarters in Lafayette in the State of Indiana, while the defendant union is affiliated with a similar organization having its headquarters in Baltimore in the State of Maryland. The plaintiff union was composed of workmen who in 1897 withdrew from the defendant union.

There does not appear to be anything illegal in the object of either union as expressed in its constitution and by-laws. The defendant union is also represented by delegates in the Central Labor Union, which is an organization composed of five delegates from each trade union in the city of Springfield, and had in its constitution a provision for levying a boycott upon a complaint made by any union.

The case is before us upon a report after a final decree in favor of the plaintiffs, based upon the findings stated in the report of the master.

The contest became active early in the fall of 1898. In September of that year, the members of the defendant union declared "all painters not affiliated with the Baltimore headquarters to be non-union men," and voted to "notify the bosses" of that declaration. The manifest object of the defendants was to have all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business, and to that end they combined and conspired to get the plaintiffs and each of them to join

Digitized by Google

the defendant association, peaceably if possible, but by threat and intimidation if necessary. Accordingly, on October 7, they voted that "if our demands are not complied with, all men working in shops where Lafayette people are employed refuse to go to work." The plaintiffs resisting whatever persuasive measures, if any, were used by the defendants, the latter proceeded to carry out their plan in the manner fully set forth in the master's report. Without rehearsing the circumstances in detail it is sufficient to say here that the general method of operations was substantially as follows.

A duly authorized agent of the defendants would visit a shop where one or more of the plaintiffs were at work and inform the employer of the action of the defendant union with reference to the plaintiffs, and ask him to induce such of the plaintiffs as were in his employ to sign applications for reinstatement in the defendant union. As to the general nature of these interviews the master finds that the defendants have been courteous in manner, have made no threats of personal violence, have referred to the plaintiffs as non-union men, but have not otherwise represented them as men lacking good standing in their craft; that they have not asked that the Lafayette men be discharged, and in some cases have expressly stated that they did not wish to have them discharged, but only that they sign the blanks for reinstatement in the defendant union. The master, however, further finds, from all the circumstances under which those requests were made, that the defendants intended that employers of Lafayette men should fear trouble in their business if they continued to employ such men, and that employers to whom these requests were made were justified in believing that a failure on the part of their employees who were Lafayette men to sign such reinstatement blanks, and a failure on the part of the employers to discharge them for not doing so, would lead to trouble in the business of the employers in the nature of strikes or a boycott, and the employers to whom these requests were made did believe that such results would follow, and did suggest their belief to the defendants, and the defendants did not deny that such results might occur; that the strikes which did occur appear to have been steps taken by the defendants to obtain the discharge of such employees as were Lafayette men who declined to sign applica-

Digitized by Google

tion blanks for reinstatement; that these defendants did not in all cases threaten a boycott of the employers' business, but did threaten that the place of business of at least one such employer would be left off from a so-called "fair list" to be published by the Baltimore Union. The master also found that, from all the evidence presented, the object which the Baltimore men and the defendant association sought to accomplish in all the acts which were testified to was to compel the members of the Lafayette Union to join the Baltimore Union, and as a means to this end they caused strikes to be instituted in the shops where strikes would seriously interfere with the business of the shops, and in all other shops they made such representations as would lead the proprietors thereof to expect trouble in their business.

We have, therefore, a case where the defendants have conspired to compel the members of the plaintiff union to join the defendant union, and to carry out their purpose have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that failing, then to discharge them. It matters not that this request to discharge has not been expressly made. There can be no doubt, upon the findings of the master and the facts stated in his report, that the compulsory discharge of the plaintiffs in case of non-compliance with the demands of the defendant union is one of the prominent features of the plan agreed upon.

It is well to see what is the meaning of this threat to strike, when taken in connection with the intimation that the employer may "expect trouble in his business." It means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will, by strong, persistent, and organized persuasion and social pressure of every description, do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practised by organized labor will be made to injure him in his business, even to his ruin, if possible; and that, by the use of vile and opprobrious

Digitized by Google

epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ; and that whether or not all this be done by the strikers or only by their sympathizers, or with the open sanction and approval of the former, he will have no help from them in his efforts to protect himself.

However mild the language or suave the manner in which the threat to strike is made under such circumstances as are disclosed in this case, the employer knows that he is in danger of passing through such an ordeal as that above described, and those who make the threat know that as well as he does. Even if the intent of the strikers, so far as respects their own conduct and influence, be to discountenance all actual or threatened injury to person or property or business, except that which is the direct necessary result of the interruption of the work, and even if their connection with the injurious and violent conduct of the turbulent among them or of their sympathizers be not such as to make them liable criminally or even answerable civilly in damages to those who suffer, still with full knowledge of what is to be expected they give the signal, and in so doing must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences will cause in the mind of those — whether their employer or fellow workmen — against whom the strike is directed; and the measure of coercion and intimidation imposed upon those against whom the strike is threatened or directed is not fully realized until all those probable consequences are considered.

Such is the nature of the threat, and such the degree of coercion and intimidation involved in it.

If the defendants can lawfully perform the acts complained of in the city of Springfield, they can pursue the plaintiffs all over the State in the same manner, and compel them to abandon their trade or bow to the behests of their pursuers.

It is to be observed that this is not a case between the employer and employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of the same craft, and each having the same right as any one of the others to pursue his calling. In this, as in every other case of equal rights, the right of each individual is to be exercised with due regard to the sim-



Digitized by Google

ilar right of all others, and the right of one be said to end where that of another begins.

The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection. Sir William Erle in his book on Trade Unions, page 12, has stated this in the following language, which has been several times quoted with approval by judges in England: "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description — done, not in the exercise of the actor's own right, but for the purpose of obstruction — would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition."

The same rule is stated with care and discrimination by Wells, J. in *Walker* v. *Cronin*, 107 Mass. 555, 564: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance, or loss, come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

In this case the acts complained of were calculated to cause damage to the plaintiffs, and did actually cause such damage; and they were intentionally done for that purpose. Unless, therefore, there was justifiable cause, the acts were malicious and unlawful. *Walker* v. *Cronin*, *ubi supra*. *Carew* v. *Rutherford*, 106 Mass. 1, and cases cited therein.

The defendants contend that they have done nothing unlawful, and, in support of that contention, they say that a person

Digitized by Google

may work for whom he pleases; and, in the absence of any contract to the contrary, may cease to work when he pleases, and for any reason whatever, whether the same be good or bad; that he may give notice of his intention in advance, with or without stating the reason; that what one man may do several men acting in concert may do, and may agree beforehand that they will do, and may give notice of the agreement; and that all this may be lawfully done notwithstanding such concerted action may, by reason of the consequent interruption of the work, result in great loss to the employer and his other employees, and that such a result was intended. In a general sense, and without reference to exceptions arising out of conflicting public and private interests, all this may be true.

It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first head-note in *Allen* v. *Flood*, as reported in [1898] A. C. 1, as follows: "An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action." If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate.

In so far as a right is lawful, it is lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor, as where one digs upon his own land for water, (*Greenleaf* v. *Francis*, 18 Pick. 117,) or makes a written lease of his land for the purpose of terminating a tenancy at will, (*Groustra* v. *Bourges*, 141 Mass. 7,) but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause; and this justification may be found sometimes in the circumstances under which it is done irrespective of motive, sometimes in the motive

Digitized by Google

alone, and sometimes in the circumstances and motive combined.

This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel and of procuring a wife to leave her husband. *Tasker* v. *Stanley*, 153 Mass. 148, and cases therein cited. Indeed the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent. See on this an instructive article in 8 Harvard Law Review, 1, where the subject is considered at some length.

It is manifest that not much progress is made by such general statements as those quoted above from *Allen* v. *Flood*, whatever may be their meaning.

Still standing for solution is the question, Under what circumstances, including the motive of the actor, is the act complained of lawful, and to what extent?

In cases somewhat akin to the one at bar this court has had occasion to consider the question how far acts, manifestly coercive and intimidating in their nature, which cause damage and injury to the business or property of another, and are done with intent to cause such injury and partly in reliance upon such coercion, are justifiable.

In *Bowen* v. *Matheson*, 14 Allen, 499, it was held to be lawful for persons engaged in the business of shipping seamen to combine together into a society for the purpose of competing with other persons engaged in the same business, and it was held lawful for them, in pursuance of that purpose, to take men out of a ship, if men shipped by a non-member were in that ship; to refuse to furnish seamen through a non-member; to notify the public that they had combined against non-members, and had "laid the plaintiff on the shelf"; to notify the plaintiff's customers and friends that the plaintiff could not ship seamen for them; and to interfere in all these ways with the business of the plaintiff as a shipping agent, and compel him to abandon the same. The justification for these acts, so injurious to the business of the plaintiff and so intimidating in their nature, is to be found in the law of competition. No legal right of the plaintiff was infringed upon, and, as stated by Chapman, J., in giving the opinion of the court (p. 503), "if their effect is

Digitized by Google

to destroy the business of shipping-masters who are not members of the association, it is such a result as in the competition of business often follows from a course of proceeding that the law permits." The primary object of the defendants was to build up their own business, and this they might lawfully do to the extent disclosed in that case, even to the injury of their rivals.

Similar decisions have been made in other courts where acts somewhat coercive in their nature and effect have been held justifiable under the law of competition. *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25. *Bohn Manuf. Co.* v. *Hollis*, 54 Minn. 223. *Macauley* v. *Tierney*, 19 R. I. 255.

On the other hand, it was held in *Carew* v. *Rutherford*, 106 Mass. 1, that a conspiracy against a mechanic, — who is under the necessity of employing workmen in order to carry on his business, — to obtain a sum of money from him which he is under no legal obligation to pay, by inducing his workmen to leave him, or by deterring others from entering into his employ, or by threatening to do this so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the demands, is an illegal, if not a criminal, conspiracy ; that the acts done under it are illegal, and that the money thus obtained may be recovered back. Chapman, C. J., speaking for the court, says that there is no doubt that, if the parties under such circumstances succeed in injuring the business of the mechanic, they are liable to pay all the damages done to him.

That case bears a close analogy to the one at bar. The acts there threatened were like those in this case, and the purpose was, in substance, to force the plaintiff to give his work to the defendants, and to extort from him a fine because he had given some of his work to other persons.

Without now indicating to what extent workmen may combine and in pursuance of an agreement may act by means of strikes and boycotts to get the hours of labor reduced or their wages increased, or to procure from their employers any other concession directly and immediately affecting their own interests, or to help themselves in competition with their fellow-workmen, we think this case must be governed by the principles laid down

Digitized by Google

in *Carew* v. *Rutherford*, *ubi supra*. The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work at their trade. It is true they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this. As stated by Lord Bramwell in *Regina* v. *Druitt*, 10 Cox C. C. 592, 600, "No right of property, or capital, . . . was so sacred, or so carefully guarded by the law of this land, as that of personal liberty. . . . That liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body."

It was not the intention of the defendants to give fairly to the employer the option to employ them or the plaintiffs, but to compel the latter against their will to join the association, and to that end to molest and interfere with them in their efforts to procure work by acts and threats well calculated by their coercive and intimidating nature to overcome the will.

The defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them.

The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws.

Digitized by Google

The language used by this court in *Carew* v. *Rutherford*, 106 Mass. 1, 15, may be repeated here with emphasis, as applicable to this case: "The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country; and if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both." See, in addition to the authorities above cited, *Commonwealth* v. *Hunt*, 4 Met. 111; *Sherry* v. *Perkins*, 147 Mass. 212, 214; *Vegelahn* v. *Guntner*, 167 Mass. 92, 97; St. 1894, c. 508, § 2;* *State* v. *Donaldson*, 3 Vroom, 151; *State* v. *Stewart*, 59 Vt. 273; *State* v. *Glidden*, 55 Conn. 46; *State* v. *Dyer*, 67 Vt. 690; *Lucke* v. *Clothing Cutters & Trimmers' Assembly*, 77 Md. 396.

As the plaintiffs have been injured by these acts, and there is reason to believe that the defendants contemplate further proceedings of the same kind which will be likely still more to injure the plaintiffs, a bill in equity lies to enjoin the defendants. *Vegelahn* v. *Guntner*, *ubi supra*.

Some phases of the labor question have recently been discussed in the very elaborately considered case of *Allen* v. *Flood*, *ubi supra*. Whether or not the decision made therein is inconsistent with the propositions upon which we base our decision in this case, we are not disposed, in view of the circumstances under which that decision was made, to follow it. We prefer the view expressed by the dissenting judges, which view, it may be remarked, was entertained not only by three of the nine lords who sat in the case, but also by the great majority of the common law judges who had occasion officially to express an opinion.

There must be, therefore, a decree for the plaintiffs. We think, however, that the clause, "or by causing or attempting to cause, any person to discriminate against any employer of members of plaintiffs' said association (because he is such employer) in giving or allowing the performance of contracts to or by such employer," is too broad and indefinite, inasmuch as it might seem to include mere lawful persuasion and other similar and peaceful acts; and for that reason, and also because so far as respects un-

* This section is as follows: "No person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing in the employment of any person or corporation."

Digitized by Google

lawful acts it seems to cover only such acts as are prohibited by other parts of the decree, we think it should be omitted.

Inasmuch as the association of the defendants is not a corporation, an injunction cannot be issued against it as such, but only against its members, their agents and servants.

As thus modified, in the opinion of the majority of the court, the decree should stand. *Decree accordingly.*

HOLMES, C. J. When a question has been decided by the court, I think it proper, as a general rule, that a dissenting judge, however strong his convictions may be, should thereafter accept the law from the majority and leave the remedy to the Legislature, if that body sees fit to interfere. If the decision in the present case simply had relied upon *Vegelahn* v. *Guntner*, 167 Mass. 92, I should have hesitated to say anything, although I might have stated that my personal opinion had not been weakened by the substantial agreement with my views to be found in the judgments of the majority of the House of Lords in *Allen* v. *Flood*, [1898] A. C. 1. But much to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one, and to open an issue which otherwise I might have thought closed. The difference between my brethren and me now seems to be a difference of degree, and the line of reasoning followed makes it proper for me to explain where the difference lies.

I agree that the conduct of the defendants is actionable unless justified. *May* v. *Wood*, 172 Mass. 11, 14, and cases cited. I agree that the presence or absence of justification may depend upon the object of their conduct, that is, upon the motive with which they acted. *Vegelahn* v. *Guntner*, 167 Mass. 92, 105, 106. I agree, for instance, that if a boycott or a strike is intended to override the jurisdiction of the courts by the action of a private association, it may be illegal. *Weston* v. *Barnicoat*, 175 Mass. 454. On the other hand, I infer that a majority of my brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants was combined. A sensible workingman would not

Digitized by Google

contend that the courts should sanction a combination for the purpose of inflicting or threatening violence or the infraction of admitted rights. To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.

Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor as a whole secures a larger share by that means. The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude, always. Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing. It is only by divesting our minds of questions of ownership and other machinery of distribution, and by looking solely at the question of consumption, — asking ourselves what is the annual product, who consumes it, and what changes would or could we make, — that we can keep in the world of realities. But, subject to the qualifications which I have expressed, I think it lawful for a body of workmen to try by combination to get more than they now are getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike.

Digitized by Google

## KATE L. PEASE & others *vs.* SUPREME ASSEMBLY ROYAL SOCIETY OF GOOD FELLOWS & another.

Suffolk. December 6, 1899. — September 5, 1900.

Present: HOLMES, C. J., KNOWLTON, BARKER, HAMMOND, & LORING, JJ.

*Beneficiary Association — Certificate — Equity — By-laws — Claimants to Fund.*

A beneficiary association admitting its liability to pay the sum named in a certificate of insurance to the persons entitled to it, and the only question being as to who are such persons, a bill in equity will lie to determine that question, circuity of action being thus avoided.

The charter of a foreign corporation provided that upon the death of a member there might be paid out of the "Widows' and Orphans' Benefit Fund" a certain sum "to his family, or as he may direct." The certificate was issued in 1888, the beneficiary, who was the member's wife, died in 1895, and the member died in 1897. In the last named year, prior to his death, a by-law was amended so as to read that if, on the death of all the beneficiaries before that of a member, he should make no further designation of beneficiaries, the benefit should be paid to his next of kin. The member made no further designation. *Held*, on a bill in equity by the only next of kin of the member against the uncle and next of kin of the member's wife, who was the member's executor and sole legatee, that the by-law as amended was valid, and that the plaintiff was entitled to the fund.

BILL IN EQUITY, filed in the Superior Court, by the sisters and next of kin of Herbert H. Ceiley, a member of Menotomy Assembly, a subordinate lodge of the defendant corporation, against that corporation and Joel Barnard, an uncle and next of kin of the wife of Ceiley, and his executor and sole legatee. The prayer was for a decree that the plaintiffs were entitled to the sum due on a benefit certificate for $3,000 issued to Ceiley; that Barnard surrender the certificate and be enjoined from bringing suit thereon; and that the defendant corporation, upon the surrender of the certificate, pay the plaintiffs the amount due thereunder. A decree was entered for the plaintiffs; and Barnard appealed to this court.

*J. P. Parmenter*, for the plaintiffs.

*J. Q. A. Brackett*, for Barnard.

HAMMOND, J. The defendant corporation admitting its liability to pay the sum named in the certificate to the persons

Digitized by Google

entitled to it, and the only question being whether the plaintiffs or Barnard are such persons, a bill in equity will lie to determine that question. Circuity of action is thus avoided. *Tyler* v. *Odd Fellows' Mutual Relief Association*, 145 Mass. 134. *Marsh* v. *American Legion of Honor*, 149 Mass. 512. *McCarthy* v. *New England Order of Protection*, 153 Mass. 314.

Although several questions have been argued before us, yet as the conclusion to which we have come upon one of them is decisive of the rights of the parties, it is unnecessary to express an opinion upon the others.

The corporation is a foreign corporation, and its charter provides that upon the death of a member there may be paid out of the "'Widows' and Orphans' Benefit Fund' . . . a sum not exceeding six thousand dollars . . . to his family, or as he may direct." It will be observed that there is no limit as to the class of persons, and therefore the member may appoint any person to be the beneficiary.

The certificate was issued in 1888, the beneficiary died in 1895, and the member died in November, 1897. In 1897, prior to his death, section 5 of By-law X. was amended. He was bound by this change, and, so far as that by-law is material, it must be taken as it stood at the time of his decease. *Spilman* v. *Home Circle*, 157 Mass. 128. *Pain* v. *Société St. Jean Baptiste*, 172 Mass. 319. The beneficiary having died before the member, and no other or further designation of a beneficiary having been made upon which a certificate issued, the case falls within the terms of section 5, By-law X., as amended. By the plain reading of that section the plaintiffs, being the only next of kin of the member, are entitled to receive the money.

But the validity of the section is attacked. The defendant Barnard contends that it is inconsistent with the charter, and in support of that contention he argues that only two classes can be beneficiaries: first, the family of the member, and, second, any person he may direct; and that inasmuch as the plaintiffs were not members of his family, and were not persons to whom he specially directed the money to be paid, they do not come within either class named in the charter.

But this is taking too narrow a view of the charter and of the scope and intent of the by-law. By the terms of the charter

Digitized by Google

the money may be paid to the family of the member, "or as he may direct." It was not the intention of the last phrase to limit the class of persons from whom the beneficiary should be selected, but rather to enlarge that class, and to permit the member to designate as a beneficiary any person, whether or not a member of his family or dependent upon him. The effect of the whole language is that the member may appoint any person to be a beneficiary. The plaintiffs, therefore, could have been beneficiaries had the member chosen to make them such. And the question is whether in effect he did this.

While the charter provides for the creation and payment of a certain fund to the family of a member, "or as he may direct," it nowhere states the manner in which that direction shall be made. That is left to be arranged between the corporation and the member; and by a series of by-laws set out in Law X. the corporation has attempted to state how the designation shall be made in certain cases.

Sections 1 and 2 provide for the forwarding of the application for membership, and prescribe the manner in which at the time of making the application the beneficiary shall be named. Section 4 provides for the payment of the fund in the case of the death of one or more of the beneficiaries named in the certificate during the life of the member. Section 5 provides for the payment in case all the beneficiaries selected by the member be dead, and he has made no other or further designation upon which a new certificate has issued.*

---

* The by-laws in full, including section 5 as amended, are as follows:

"LAW X. BENEFIT CERTIFICATE AND REGISTRATION.

"Section 1. The Secretary of every Assembly shall forward to the Supreme Secretary every application for beneficial or social membership within five days from the applicant's initiation, and with each application for beneficial membership two dollars for registration fee, and for the payment of this fee the Secretary and Ruler are hereby authorized to draw orders on the Treasurer, without a vote of the Assembly.

"Sect. 2. Each member shall enter upon his application the name (or names) and relationship of the members of his family, relatives, or those dependent upon him, to whom he desires his benefits paid, and the same shall be entered in the benefit certificate according to said direction."

"Sect. 4. In the event of the death of one or more of the beneficiaries of a member, before the decease of such member, if he shall make no other or further designation of beneficiary, in accordance with the laws of this

Digitized by Google

The plain purpose of these by-laws is to provide for all cases where, by reason of death or otherwise, it is impossible to pay the money as specially directed by the member, to the end that some one shall have this benefit.

And we do not see why this cannot be done. Indeed, for aught that appears to the contrary in this case, it would seem that in a corporation like this, where by the charter the payment may be made to any one as the member may direct, a by-law would be perfectly valid providing that in the absence of any special direction the money should be paid to certain persons or classes therein named; and we do not see why the whole matter of direction may not be regulated by by-laws and any special designation in the benefit certificate be dispensed with. The charter cannot be held to mean that the direction must be made in the benefit certificate. Any method of designation by the member, whether specially made in some one document or as the result of a by-law, provided that the member and the corporation understand each other, is warranted by the charter.

Ceiley was a member and a permanent officer of the organization, and it must be assumed that he knew and understood this by-law. He knew that it provided that unless he took out a new certificate his next of kin would be considered as his beneficiaries, and that the money would be paid to them as such. It is not to be supposed that he intended to dispute the validity of this by-law, but rather that it should be operative, and that the fund should go in accordance therewith. Under these circumstances his failure to take out a new certificate was in effect a designation of his next of kin as the real beneficiaries, and it was not any less a direction than it would have been if he had taken out a new certificate. The case is clearly distinguishable from *Harding* v. *Littlehale*, 150 Mass. 100.

---

society the benefit shall upon his death be paid in full to the surviving beneficiary or beneficiaries, each sharing pro rata as provided in the benefit certificate.

"Sect. 5. In the event of the death of all the beneficiaries of a member before the decease of such member, if he shall make no other or further designation of beneficiaries, upon which benefit certificate shall have been issued, in accordance with the laws of this society the benefit shall be paid to his next of kin; and if there be no next of kin to receive such benefit, it shall revert to the W. and O. B. Fund."

Digitized by Google

Such a direction is not inconsistent with the charter. The by-law is valid, and the fund should go to the plaintiffs as the next of kin. *Sargent* v. *Knights of Honor*, 158 Mass. 557.

*Order overruling the demurrer affirmed; decree for the plaintiffs.*

---

THERESA H. MORSE & another *vs.* INHABITANTS OF NATICK.

Middlesex. January 16, 1900. — September 5, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Will — Life Estate — Public Charity — Permanent Care of Burial Place and Monument — Perpetuity — Perpetual Trust — Agreed Facts — Waiver of Question of Form.*

A testator gave his sister, R., the residue with power "to sell and dispose of so much . . . as will ensure her a comfortable living," with "full control" and "with full power to deed to her grantees, their heirs and assigns forever," and gave at her decease the balance to the town of N., in trust, the income to be used "for the preservation of the monument which my executor is hereby authorized to erect at my grave, and for the care and beautifying of my lot in the cemetery. . . . The town shall not expend a greater sum than four per cent per annum, deeming that as large an amount as the town ought to pay." The residue consisted of real estate. R. survived the testator and left at the time of her decease a will, in which she gave the residue of her estate to A. and B. *Held*, on a writ of entry by A. and B. against the town of N., that R. took under her brother's will a life estate; that the bequest for the care of the monument and the cemetery lot was a good perpetual trust; that the fact that the town had ceased to own the cemetery at R.'s death, or that the testator never owned a lot in the cemetery, was immaterial; that it made no difference that the property devised consisted of real estate, and that the direction that not more than four per cent per annum should be expended by the town, referred to an amount not exceeding four per cent on the principal.

On a writ of entry the pleading by a tenant of a general denial is irregular in form, but by submitting the case on agreed facts the parties waive all questions of form.

WRIT OF ENTRY, to recover possession of a certain farm in Natick consisting of about fifty acres of land, with a dwelling-house thereon. The answer was a general denial.

The case was submitted to the Superior Court, and, after judgment for the demandants, to this court, on appeal, upon agreed facts, in substance as follows.

Digitized by Google

At the time of his death, in 1887, Collins Morse owned the farm in question, and left a will, the material portion of which is as follows:

"Fifth. I give, devise and bequeath what is not otherwise disposed of by me, all the rest and residue of my estate, to my sister, Louisa M. Rockwood, for and during her natural life, and she is empowered to sell and dispose of so much of my estate as will ensure her a comfortable living, and to that end she is authorized to sell such portion of my real estate by public or private sale, giving good and sufficient deeds therefor, meaning and intending to give her full control of the same, with full power to deed to her grantees, their heirs and assigns forever.

"And at her decease, I give and devise the balance of my estate, of whatever name or nature, to the town of Natick, but in trust nevertheless, the income of which is to be used for the preservation of the monument which my executor is hereby authorized to erect at my grave, and for the care and beautifying of my lot in the cemetery. A report of the expenditure shall be made in the annual report of the proceedings of said town.

"That the town shall not expend a greater sum than four per cent per annum, deeming that as large an amount as the town ought to pay."

The testator left as his only heirs at law Louisa M. Rockwood, a sister, the three children of a deceased sister, and Isaac D. Morse, a brother, who died intestate after the testator and before his sister Louisa, leaving no heirs other than those named herein as heirs of his brother. Louisa M. Rockwood took possession of the farm after the death of her brother Collins, and continued to use and enjoy it until the time of her death, on March 21, 1895. She did not under the power contained in the will sell or convey during her lifetime any part of it, and made no disposition of it, unless such disposition was made by the following clause of her will: "Tenth. All the rest, residue and remainder of my estate of every kind I give to Mrs. Edwin Gale and Mrs. James W. Morse, both of Natick, share and share alike to them, their heirs and assigns forever."

Theresa H. Morse and Isabella D. Gale, the demandants, who are the legatees just named above, contend that they are entitled to recover the farm as devisees under the will. The town

Digitized by Google

of Natick has been in possession of the farm since the death of Louisa M. Rockwood, and contends that it is entitled to hold the same as devisee under the will of Collins Morse. At no time did Collins Morse own any lot in any cemetery, and he was buried in the lot owned by Louisa M. Rockwood in Dell Park Cemetery in Natick. She provided for the care of the same in her will, but the amount realized by the cemetery thereunder was only $55. This cemetery was at the time of the death of Collins Morse owned by the town of Natick, but at the time of the death of Mrs. Rockwood was owned by a corporation known as Dell Park Cemetery Association, incorporated under a special act of the Legislature in 1890.

If the demandants are entitled to recover the whole or any part of the demanded premises, judgment may be entered for such part; otherwise judgment may be entered for the tenant.

*P. H. Cooney*, for the tenant.

*L. H. Wakefield & H. Hogan*, for the demandants.

MORTON, J. It is clear, we think, that Mrs. Rockwood took, under her brother's will, only a life estate in the rest and residue, with power "to sell and dispose of so much . . . as will ensure her a comfortable living." *Smith* v. *Snow*, 123 Mass. 323. *Kelley* v. *Meins*, 135 Mass. 231. *Welsh* v. *Woodbury*, 144 Mass. 542. There is nothing which gives her a power to dispose of it by will, and the testator's purpose which is expressed, "to give her full control, . . . with full power to deed to her grantees, their heirs and assigns forever," does not convert the interest given her from a life estate into a fee. It was inserted, we think, only to make more clear her right to sell and convey in case it became necessary to do so in order to ensure her a comfortable living. So far, therefore, as the claim of the demandants rests on the alleged right of Mrs. Rockwood to dispose of the rest and residue, or any part of it, by will, it must fail. But as heir at law of her brother she would be entitled to an undivided third of the farm if the attempted disposition of his estate after her death should prove for any reason to be invalid, and this interest, and any other which she had acquired in the mean time, would pass by her will to the demandants. It becomes necessary, therefore, to consider the effect of the disposition which he has attempted to make in that event, which is as

Digitized by Google

follows: "At her [his sister's] decease, I give and devise the balance of my estate, of whatever name or nature, to the town of Natick, but in trust nevertheless, the income of which is to be used for the preservation of the monument which my executor is hereby authorized to erect at my grave, and for the care and beautifying of my lot in the cemetery. . . . The town shall not expend a greater sum than four per cent per annum, deeming that as large an amount as the town ought to pay."

It is settled in this Commonwealth that a bequest to provide for the permanent care and beautifying of a burial place and monument is not a public charity, and is void at common law as creating a perpetuity. *Bates* v. *Bates*, 134 Mass. 110. See also *Sherman* v. *Baker*, 20 R. I. 446. But it is also settled in this State that a trust to keep a burial lot and monument always in good order is, under our statutes, a good perpetual trust. *Green* v. *Hogan*, 153 Mass. 462. *Bartlett, petitioner*, 163 Mass. 509, 513. The observation in *Leonard* v. *Haworth*, 171 Mass. 496, 499, has no reference to statutory trusts for the purposes there referred to. The fact that the town had ceased to own the cemetery at Mrs. Rockwood's death, or that the testator did not himself own the lot where he was buried, and never owned a lot in the cemetery, is not, we think, material. The effect of the statute is to authorize a city or town to hold money in trust, whether the cemetery is public or private, *Green* v. *Hogan*, *ubi supra*; St. 1884, c. 186, § 1; and there is nothing to prevent a testator from establishing a fund for the care and beautifying of the lot where he may be buried, and the preservation of the monument erected at his grave, even though he does not own the lot. The purpose of the testator in the present case was, we think, to provide for the care and beautifying of the place of his burial, and for the preservation of the monument erected at his grave. There is nothing to show that the bequest was conditioned, or was intended to be conditioned, on his ownership of the lot. What the effect would be if the parties owning the lot refused to allow at any time the income, or any portion of it, to be expended on the lot or the monument, we need not consider, as that question does not arise. The trust being a valid perpetual trust, it makes no difference, of course, that the property which is devised consists of real estate. The direction



Digitized by Google

that not more than four per cent per annum shall be expended by the town refers, we think, to income to an amount not exceeding four per cent on the principal. The gift is, in the first instance, of the whole income, to be used for the purposes named, and it is hardly to be supposed, we think, that the testator could have intended, by the direction referred to, to limit the expenditure to the trifling amount of four per cent of it. There is nothing to show that the income has been or is, or probably will be, more than that, or that there has been or will be any accumulation. Indeed, it may be fairly assumed that it is not probable that the town will realize more than four per cent from the trust fund. We do not see, therefore, how it can be held, upon the facts before us, that the bequest is void.

The pleading by the tenant is irregular in form, but by submitting the case on agreed facts the parties have waived all questions of form.

The result is, that, in accordance with the stipulation contained in the agreed facts, we think that the judgment for the demandants should be set aside, and judgment entered for the tenant. *So ordered.*

---

## EDWARD HAMLIN & another *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & another.

Suffolk. January 16, 1900. — September 5, 1900.

Present: KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Easement — Railroad Crossing — Plea in Bar — Deed — Right to maintain Gates at Crossing.*

A bill in equity to restrain the obstruction of a right of way over a railroad, and the proceedings thereon, which leave open the question whether the defendant has a right to maintain gates at the crossing, cannot be pleaded in bar of a bill in equity to restrain the maintenance of gates subsequently erected at such crossing.

A landowner who has granted a right of way of a definite width cannot narrow that width by building a permanent fence upon it.

Upon the facts of this case, which was a suit in equity to restrain the obstruction of a right of way over a railroad, the defendant had no right to maintain gates or bars at the crossing in question.

Digitized by Google

BILL IN EQUITY, filed April 11, 1898, against the New York, New Haven, and Hartford Railroad Company and the Old Colony Railroad Company, to restrain the obstruction of a right of way. Hearing before *Hammond*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in January, 1900, and afterwards was submitted on briefs to all the justices except *Holmes*, C. J.

*R. M. Morse*, (*M. Morton* with him,) for the plaintiffs.

*J. H. Benton, Jr.*, for the defendants.

BARKER, J. In the year 1845 the plaintiffs' predecessor in title, owning the tract of land through which a railroad was about to be built, conveyed to the company which was to build the railroad the strip of his land subsequently described in the location of April 16, 1846. The grantor owned other lands on each side of the strip, and his deed stipulated that the company should make a suitable road crossing. More than one crossing was used during the first nine or ten years. In 1854, by two deeds, parts of one transaction, the landowner released to the company all the rights to pass over the railroad, and the company in turn conveyed to the landowner, his heirs and assigns, the right of way now in question. The railroad was built with a single track in 1845, and a second track was added in 1848. From 1854 the crossing then granted and established remained in use, and was not obstructed by the owners of the railroad until after January 25, 1875, although a new location of the railroad was filed in 1859. On January 25, 1895, the crossing having been obstructed by the defendants, the plaintiffs filed a bill to restrain them from further interference with the plaintiffs' use of the way. This is the case reported in *Hamlin* v. *New York, New Haven, & Hartford Railroad*, 166 Mass. 462, in which a final decree in favor of the plaintiffs was entered on October 6, 1896. The defendants then established on the lines between their lands and that of the plaintiffs, fences across each end of the way, with gates fourteen feet wide in each fence. Thereupon the plaintiffs brought a petition for contempt, resulting in a decree from which the defendants appealed. Pending this appeal they substituted for the fourteen foot gates other gates

Digitized by Google

thirty-eight and one half feet in length. Each of these gates was divided into two parts, running upon rails in the upper part of the structure. When these gates are open the way is unobstructed for a space of thirty-eight and one half feet at each end, and is obstructed at each end for ten feet on each side of the gateway, the obstructions in such case being the fences and the opened gates which then stand next the fences. Upon constructing these gates the defendants locked them and sent the key to the plaintiffs, who returned the key and brought a second petition for contempt. A hearing upon this petition resulted in a report and reservation for the full court of the questions whether the defendants had the right to erect gates at the crossing, and whether they might be permitted to do so if they employed proper persons to tend them, it being agreed that the defendants' appeal from the decree upon the first petition for contempt might be taken up and heard at the same time with the questions so reserved.

By the decision reported in *Hamlin* v. *New York, New Haven, & Hartford Railroad*, 170 Mass. 548, this court ordered the report to be discharged, upon the ground that the decree in the original cause expressly left open the right of the defendants to maintain gates, and that if the plaintiffs desired to contest their right to do so it should be done in proceedings where that right would be directly in issue. The rescript to this effect was sent down on March 30, 1898, and the present bill was filed on April 11, 1898. It alleges the right of way, setting out by copy the conveyance of it by the deed of October 16, 1854, and alleging that the New York, New Haven, and Hartford Railroad Company has obstructed the way by the erection of large, heavy gates across it, and for the entire width thereof, on both sides of the tracks. To this bill each defendant filed a plea, as well as an answer. A ruling was made that the pleas were not sustained; and a bill of the defendants' exceptions to the ruling was filed and allowed, and is now before this court. In June, 1899, the case was heard upon the merits, and by consent of the parties was reported without decision to this court, such decree to be entered as the facts may require.

1. The rulings excepted to were right. The pleas set up the original bill and the proceedings thereon as a bar to the

Digitized by Google

present bill. But the question whether the defendants have a right to maintain gates at the crossing was left open by the proceedings pleaded in bar. The final decree in favor of the plaintiffs in those proceedings, which decree was ordered affirmed by this court, was "without prejudice to the rights of the defendants, if any they have, to maintain proper gates or bars across said way;" and the decree entered after the decision of this court, under its rescript, was "without prejudice to any right of the defendants, to maintain proper gates or bars across said way." The defendants' exceptions are therefore overruled.

2. It is also plain that the way granted by the deed of October 16, 1854, is in a large part cut off and made impossible of use by the plaintiffs by the present gates and fences across the ends of the way, even when the gates are opened as widely as possible. The way granted was not merely thirty-eight and one half feet in width. The deed gives, in addition to a way of that width, to the grantee, his heirs and assigns, the right to "pass on to his and their own land at any angle whatever with said railroad bed that he and they may see fit, whether within said thirty-eight and one half feet or not, but not more than ten feet outside of said thirty-eight and one half feet." As the crossing is now arranged, the fences put up at each end of it by the defendants, and the gates when opened by sliding the two parts of each gate to the right and left upon the division lines, completely obstruct twenty feet of each end of the way as deeded, over which the plaintiffs have the right to have foot passengers, animals, and vehicles pass on to the plaintiffs' land after having crossed the roadbed of the railroad in a straight line. The allegation of the bill that the defendants have obstructed the plaintiffs' way by the erection of the present gates is therefore maintained. There are on both sides of the tracks obstructions to the use of the way which are contrary to the expressly granted rights of the plaintiffs, and for which they are entitled to relief under the present bill. The landowner having granted the way of a definite width, he cannot narrow that width by building a permanent fence upon it. *Salisbury* v. *Andrews*, 19 Pick. 250, 258. *Welch* v. *Wilcox*, 101 Mass. 162. *Tucker* v. *Howard*, 122 Mass. 529, 533. *Dickinson* v. *Whiting*, 141 Mass. 414.

3. The remaining question is whether the defendants have the

Digitized by Google

right to maintain gates or bars at the crossing. The deed contains no reservation of any such right. But the defendants contend that it is an incident to their ownership of the land which is subject to the plaintiffs' easement.

The rule is well enough stated in Jones on Easements, § 407, cited by the defendants in their brief as follows: "The rule is general that the landowner may put gates and bars across a way over his land which another is entitled to enjoy, unless of course there is something in the instrument creating the way, or in the circumstances under which it is acquired or used, which shows that the way is to be an open one." See *O'Linda* v. *Lothrop*, 21 Pick. 292; *Atkins* v. *Bordman*, 2 Met. 457; *Underwood* v. *Carney*, 1 Cush. 285; *Johnson* v. *Kinnicut*, 2 Cush. 153; *Short* v. *Devine*, 146 Mass. 119.

Considering the language of the deed of October 16, 1854, and the circumstances under which the way was acquired by the force of that deed, and those under which the way has been used, we are of the opinion that it is an open way across which the defendants have no right to maintain any gates, bars, or other fences.

The deed was made by the railroad company some ten years after the railroad began to be used, and six years after its use had become so great as to require the laying of a second track. The provision that the way is to be used by the grantee, his heirs and assigns, "in common with all other persons, if any, who have the right to use the same," justifies the inference that it was not merely a way for the use of the grantee's farm. The width of thirty-eight and one half feet where the way crosses the bed of the railroad, and of fifty-eight and one half feet at each end, looks in the same direction, and favors the construction that such a way, as wide as many highways, was intended to be something more than a mere farm crossing. Gates or bars fifty-eight and one half feet in length could not have been so arranged as to allow one who had crossed the bed of the railroad to pass on to the adjoining land at any and all points of the fifty-eight and one half feet, without an expense so great and disproportionate in establishing and maintaining and operating such gates, and without such practical difficulty in using them, that it is absurd to suppose that such an arrangement was intended by either party to the deed. The grantor's land was used only for a rail-

Digitized by Google

road, and the only reason for gates, bars, or other fences across the ends of the way, which it is reasonable to suppose could have influenced the grantor in determining upon the kind of way to be conveyed, was the protection of its railroad bed and track, and the prevention of obstruction to its cars, engines, or trains. But the deed itself deals explicitly with that matter, and in a way different from that of having fences across the ends of the way. By the express terms of the deed the rights of way granted "are to be always so used and enjoyed as to do no unnecessary damage to said railroad bed and track, and always so as not to obstruct, impede, or delay any car or cars, engine or engines, train or trains, when in motion on said railroad tracks." The deed was the act of the railroad company, done many years after the railroad was in full operation, and stipulated for that means of preventing incidental injury to the grantor by the use of the way, upon which the grantor then preferred to rely. It bound the grantee and those succeeding to his rights to use those means effectually, by making it obligatory upon them always to so use the right as to do no unnecessary damage to the railroad bed and track, and always so as to neither obstruct, impede, or delay any car, engine, or train in motion on the tracks. Besides all this, the crossing remained open and unobstructed for many years after the time of the grant, and it is plain that its first obstruction was not in pursuance of a contention that the defendants had the right for the protection of the railroad traffic to establish proper gates and bars, but was a step in the assertion by the defendants of their contention that the right of way was extinguished by the location of 1859. In the opinion of a majority of the court these circumstances, with the deed itself, sufficiently show that what the deed intended to grant was a free right of passage over a way fifty-eight and one half feet wide at each end, and thirty-eight and one half feet wide where it crossed the roadbed of the railroad, and unobstructed by gates, bars, or other fences. See *Eames* v. *Worcester & Nashua Railroad*, 105 Mass. 193; *Williams* v. *Clark*, 140 Mass. 238.

The plaintiffs are entitled to a decree declaring their rights to be in accordance with this opinion, commanding the defendants to remove all gates or other fences now maintained across the ends of the way, and permanently enjoining them, and any and

Digitized by Google

all persons or parties claiming under them, from erecting any gates, bars, or other fences across the way, and for their damages, to be ascertained by an assessor if more than nominal damages are claimed or if their amount is not agreed upon, and for costs.

*So ordered.*

---

WILLIAM REDFORD *vs.* CITY OF WOBURN.

Middlesex. January 24, 1900. — September 5, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Personal Injuries — Shut-off Box a Defect in Highway.*

*It seems* that a shut-off box in the middle of a sidewalk much used for foot travel, projecting on one side an inch and a quarter above the surrounding gravel, constitutes a defect in the highway.

TORT, for personal injuries occasioned to the plaintiff on December 4, 1897, by stepping upon a water shut-off box on the sidewalk of a public highway in Woburn. At the trial in the Superior Court, before *Stevens*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

*F. P. Curran*, for the defendant.

*E. I. Smith & C. M. Ludden*, for the plaintiff.

MORTON, J. There was evidence tending to show that the plaintiff, while in the exercise of due care, was walking along a sidewalk on Bennett Street, a public highway in the defendant town, when he stumbled over a water shut-off box which was about in the middle of the sidewalk, and received the injuries complained of. The exceptions state that the sidewalk was much used for foot travel. The defendant asked the court to rule that on all the evidence the plaintiff was not entitled to recover, and that the evidence was not sufficient to justify the jury in finding that the shut-off box was a defect. The court declined so to rule. There was a verdict for the plaintiff, and the case is here on the defendant's exceptions to the refusal of the court to give the rulings asked for.

Digitized by Google

The size of the shut-off box is not given, but the exceptions state that it was "the usual contrivance used in cities for shutting off connection between public water mains and the service pipes of private takers." It appeared that on the side next to the fence it projected one eighth of an inch above the surrounding gravel, on the northerly side one quarter of an inch, on the southerly side one half of an inch, and on the easterly side one and one quarter inches. The cause of the projection on the easterly side does not appear except inferentially. It may have been because the sidewalk was worn away on that side so as to leave the box projecting as it did, or it may have been that the slope of the sidewalk, which is stated in the exceptions to have been "in a general way" from the fence to the street, was such at that spot as to cause the box to project on its easterly side. Whatever the cause, there is nothing to show that the projection was due to an accident, or that the condition had not existed for days and perhaps weeks. The defence does not seem, indeed, to have been based on the ground that the defect, if there was one, was a matter of only a few hours' standing, but on the ground that the box did not constitute a defect, and that the evidence left it uncertain whether the box caused the injuries complained of. But, as already observed, we think that there was evidence warranting the jury in finding that the box caused the plaintiff to fall. And we do not think it could be ruled as matter of law that the jury were not warranted in finding that a shut-off box in the middle of a sidewalk much used for foot travel, projecting on one side an inch and a quarter above the surrounding gravel, did not constitute a defect. Whether such an object was liable to cause travellers while in the exercise of due care to stumble and fall, or to turn or sprain the ankle, as we infer the plaintiff did, and whether the defendant exercised reasonable care in suffering the box and sidewalk to remain in the condition in which they were, were, it seems to us, questions for the jury. See *Loan* v. *Boston*, 106 Mass. 450 *Dowd* v. *Chicopee*, 116 Mass. 93; *Spellman* v. *Chicopee*, 131 Mass. 443; *Aston* v. *Newton*, 134 Mass. 507; *Sawyer* v. *Newburyport*, 157 Mass. 430, 431; *Marvin* v. *New Bedford*, 158 Mass. 464; *Hughes* v. *Lawrence*, 160 Mass. 474. The fact that the shut-off box was the usual contrivance used in cities for the purpose for which it

Digitized by Google

was placed in the sidewalk would not justify the defendant in maintaining it in such a condition as to render the highway defective and unsafe. *Exceptions overruled.*

---

## SAMUEL H. HUDSON, administrator, *vs.* ROXBURY INSTITUTION FOR SAVINGS.

Suffolk. March 8, 1900. — September 5, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Savings Bank — Lost Deposit Book — Instructions — Withdrawal of Deposits — Waiver of Notice — By-laws — Bond of Indemnity.*

In an action by an administrator to recover of a savings bank the balance due on a deposit made by the intestate in 1861, it appeared that there was a fire in 1867 in the house occupied by the intestate, and that a good many of his papers were destroyed; that the intestate died in 1868; that the treasurer of the bank had been connected with the institution for twenty-five years, and that no one had demanded payment of the account or had presented the deposit book; and that some time between April, 1863, and October, 1875, notice was given, though it did not appear by whom, that the book was lost. *Held*, that it could not be said that the most reasonable way of accounting for the non-production of the book was not that it was destroyed among other papers in the fire, or that a finding that it was so destroyed was clearly erroneous.

In an action by an administrator to recover of a savings bank the balance due on a deposit made by the intestate, the deposit book having been destroyed, the plaintiff is excused from producing it, and requests based upon the necessity of presenting the book to obtain payment are, therefore, rightly refused.

In an action to recover of a savings bank the balance due on a deposit, a finding that the bank through its treasurer had waived the right to any other or further notice of withdrawal than such as was given before the commencement of the action, disposes of a request for a ruling that the plaintiff was not entitled to withdraw his principal or any part thereof until a certain number of days after notice given to the treasurer of intention to make such withdrawal, unless the treasurer should, at his option, make payment upon shorter notice.

In an action by an administrator to recover of a savings bank the balance due upon a deposit made in 1861 by the intestate, who died in 1868, the question of identity having been settled in favor of the plaintiff, the defendant having substantially admitted the identity of the depositor with the plaintiff's intestate, and the court having found that the deposit book had been destroyed, there would seem to be no good reason why, on general principles, the plaintiff should be required to furnish a bond of indemnity as a condition of payment by the defendant, or that payment should be refused because not having been ordered by the investing committee conformably to a by-law — Article 26 — adopted long after the plaintiff's intestate had signed a deposit book assenting to by-laws then in force, and "to those which may be hereafter made pursuant to the power granted in

Digitized by Google

the third article," the third article providing for further regulations or by-laws or alterations of those already made, and that "all such regulations, by-laws, and alterations shall be equally binding on all depositors as those by them subscribed, after the same shall have been duly made known"; and there being nothing to show that Article 26 of the amended by-laws was ever made known to the plaintiff's intestate, or to any one having any authority to represent him or his estate, or that any steps were taken to make it known to him or them.

CONTRACT, to recover the balance due on a deposit made by the defendant's intestate. At the trial in the Superior Court, without a jury, before *Bond*, J., the following by-laws of the defendant were put in evidence:

Art. 3. The corporation establishes the following by-laws; and the trustees may at any meeting, at which at least seven of them shall be present, and after due notice of such intention, at a previous meeting, make such further regulations or by-laws, or alterations of those already made, as they may deem necessary; provided that the same may be re-examined and disallowed by the corporation, at their next meeting; and all such regulations, by-laws, and alterations shall be equally binding on all depositors, as those by them subscribed, after the same shall have been duly made known.

Art. 14. On making the first deposit the depositor shall be required to subscribe, and thereby signify assent, to the regulations and by-laws of the institution.

Art. 18. Dividends may be received either personally, by the order, in writing, of the depositors, or by letter of attorney. Money deposited shall only be drawn out by the depositor, or some person by him legally authorized; but no person shall receive any part of his principal or interest without producing the original book, that such payments may be entered therein.

Art. 19. All deposits shall be entered in the books of the corporation, and a duplicate shall be given to each depositor, in which the sum paid by him shall be entered, and which shall be his voucher and the evidence of his property in said institution.

Art. 21. Money deposited shall only be drawn out by the depositor, or by some person legally authorized; but no person shall receive any part of the principal or interest without producing the original book, that such payment may be entered therein. Nor shall he be entitled to withdraw his principal or any part thereof until sixty days after he shall have given notice

Digitized by Google

to the treasurer of his intention to make such withdrawal. The treasurer may, however, at his option, make payment upon any shorter notice.

Art. 24. Depositors may receive their dividends either personally or by written order, or by letter of attorney, on production of the book of deposit.

Art. 26. As the officers of this institution may be unable to identify every depositor transacting business at the office, the institution will not be responsible for loss sustained, when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentment; provided, however, upon satisfactory proof of the loss or destruction of a book, the investing committee may order the payment of the amount due without the book; provided, also, if they think proper, they may require a bond to indemnify the institution.

Art. 30. Upon the death of any depositor, the moneys standing in the name and to the credit of such depositor shall be paid to his legatee or heir at law or legal representative, conformably to the laws of the State; and if the sum shall be under one hundred dollars, the same shall be paid to the legatee or next of kin, or legal representative, without expense of the probate of any will, or letters of administration; and it is agreed that such payment shall discharge the corporation.

Art. 31. On making the first deposit the depositor shall be required to subscribe, and thereby signify his assent, to the regulations and by-laws of the institution.

Articles 14, 21, 24, and 26 were amendments adopted in 1876.

The defendant requested the judge to rule substantially as follows: 1. That the original contract embraced the conditions in the by-laws of the defendant in force when the contract was made, and that in order to maintain the action the plaintiff must prove compliance with such terms of his intestate's contract with the defendant as are conditions precedent to a right of action; 2. That in view of Article 18 of the by-laws in force when the contract was made, providing that "no person shall receive any part of his principal or interest without producing the original book, that such payments may be entered therein," if the plaintiff or his intestate did not before the bringing of the action make a demand upon the defendant for the payment of all or of

Digitized by Google

part of the moneys to the credit of the account with the defendant, and accompany the demand with the presentation of the book of deposit, the action cannot be maintained; 8. That there was no evidence that the deposit book had ever been presented to the defendant, and a demand made for the moneys due upon account of the same and a refusal by the defendant to comply, and that the plaintiff could not recover; 4. That the evidence was, that at no time before bringing the action had there been a presentation of the book and a demand of payment, and that the plaintiff could not recover; 5. That the plaintiff's intestate was bound by such further regulations or by-laws, or alterations of those already made, as the trustees of the defendant might deem necessary, and, in conformity with the defendant's by-laws, make, although made after the intestate entered into his contract with the defendant; 6. That the intestate and the plaintiff were not entitled to withdraw the principal or any part thereof until sixty days after notice given to the defendant's treasurer of the intention, unless the treasurer should, at his option, make payment upon shorter notice, and there was no evidence that such notice was ever given or that it was waived, and the plaintiff could not maintain his action; 7. That there was no evidence that the defendant had ever received satisfactory proof of the loss or destruction of the deposit book, or that the investing committee had ever ordered payment without the production of the book, or that the defendant had ever been tendered a bond of indemnity, and that therefore the plaintiff could not recover; 8. That the nature of the contract was such that the plaintiff could not maintain the action unless, before bringing the action, a demand was made upon the defendant, and such demand was accompanied by a presentation of the deposit book, or unless satisfactory proof of the loss or destruction of the book was given to the defendant and the investing committee ordered payment without the production of the book, and that there was no evidence of compliance with any such terms, and that the plaintiff could not recover; 9. That upon all the evidence the plaintiff could not maintain his action.

The judge made the first and fifth rulings as requested, but refused to make the second, third, fourth, sixth, seventh, eighth, and ninth; and the defendant excepted.

Digitized by Google

The judge made the following special findings: "I find that the deposits in the defendant bank, May 3 and 6, 1861, were made by James Crosby, of Roxbury, the plaintiff's intestate; that the pass book relating to the deposits was destroyed by fire in 1867; that the amendments to the by-laws of the defendant, made after such deposits, were not made known to James Crosby or to any one claiming under him; that the conduct of the treasurer of the bank, during the interviews with reference to the withdrawal of the deposit and as to the commencement of this suit, was a waiver of any right of the bank to insist, as a defence to this action, upon any other or further notice of an intention to withdraw said deposit than such as was given of such intention before the commencement of this action."

He then ruled, 1. That the agreement which Crosby signed under Article 31 of the by-laws in existence at the time of the deposit was not a consent to be bound by any amendments to such by-laws except as the amendments were made in pursuance to the power granted in the third article of said by-laws. 2. That no amendment to the by-laws in existence at the time of the deposit could affect the contract between the bank and Crosby, or those claiming under him, until such amendments were duly made known to him or them. 3. That the amended by-laws did not affect the contract between Crosby and the bank, and those claiming under him, as no notice was ever given of such amended by-laws. 4. That the loss or destruction of the pass book did not work a forfeiture of, or destroy the title to, the deposit in the bank; and that such deposit did not thereby become the property of the bank. 5. That it was the intent of Article 18 of the by-laws in force at the time of the deposit by Crosby, that the pass book should be produced when it was possible to do so; that, when the party having the title to the deposit cannot produce the pass book because of its loss or destruction, it is sufficient if he prove the loss or destruction of the pass book as the reason why it is not produced, and he is entitled to receive the deposit upon a tender, in a proper case, of a sufficient indemnity to the bank against loss by reason of the payment of the deposit to him. 6. That the plaintiff is entitled to recover in this case the amount standing to the credit of Crosby upon the books of the bank at the date of the writ, under Article 30 of the by-laws in force at

Digitized by Google

the time of the deposit; he having proved that said pass book has been destroyed and that for this reason he is unable to produce it; that as administrator he ought not to be compelled to give a bond of indemnity to said bank as a condition of his recovery in this suit.

The defendant excepted to the special findings and rulings. The judge found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

*F. Paul*, for the defendant.

*P. A. Collins*, for the plaintiff.

MORTON, J. The plaintiff brings this action as administrator *de bonis non* of the estate of James Crosby to recover of the defendant the balance due on a deposit made by Crosby with the defendant bank in 1861. The plaintiff's intestate died in November, 1868, and the identity of the depositor with the plaintiff's intestate was found by the court, and seems to be satisfactorily established by the testimony as reported. The defendant, indeed, substantially admits it. The defence is that certain requirements of the by-laws have not been complied with, — principally those relating to the production of the book as a condition of payment, and to the notice to be given of a withdrawal of principal or interest, and to a bond of indemnity. There are also exceptions to certain rulings asked and not given, and to certain rulings that were made.

The court found that the book was destroyed by fire in 1867. The defendant contends that the evidence did not warrant the finding. There was evidence tending to show that there was a fire in 1867 in the house occupied by the plaintiff's intestate, and that a good many of his papers were destroyed. The treasurer of the defendant bank testified that he had been connected with the institution for twenty-five years, and that no one had demanded payment of the account or had presented the book. There was also evidence that some time between April, 1863, and October, 1875, notice was given, though it did not appear by whom, that the book was lost. We cannot say upon this evidence that the most reasonable way of accounting for the non-production of the book was not that it was destroyed amongst other papers in the fire that occurred in the house occupied by the plaintiff's intestate in 1867, or that a finding that it was so

Digitized by Google

destroyed was clearly erroneous. This finding disposes of the second, third, and fourth of the defendant's requests. The book having been destroyed, the plaintiff was thereby excused from producing it; and those requests which were based upon the necessity of presenting the book in order to obtain payment were, therefore, rightly refused. *Warhus* v. *Bowery Savings Bank*, 21 N. Y. 543. The court also found that the bank through its treasurer had waived the right to any other or further notice of withdrawal than such as was given before the commencement of this action. This finding disposes of the sixth of the defendant's requests. The court gave the first and fifth rulings asked for by the defendant. The remaining requests, except the last one, which was that on all the evidence the plaintiff could not recover, so far as they involve matters not already referred to, relate to the plaintiff's right to recover without tendering a bond of indemnity, and without payment having been ordered by the investing committee, as they were authorized to do by Article 26 of the amended by-laws in case of satisfactory proof of the loss or destruction of a book. This by-law was adopted long after the plaintiff's intestate had made the deposit in question, at which time he signed a deposit book assenting to the regulations and by-laws then in force and to "those which may be hereafter made pursuant to the power granted in the third article." The third article provided for further regulations or by-laws, or alterations of those already made, and that "all such regulations, by-laws, and alterations shall be equally binding on all depositors as those by them subscribed, after the same shall have been duly made known." There is nothing to show that Article 26 of the amended by-laws was ever made known to the plaintiff's intestate or to any one having any authority to represent him or his estate, or that any steps were taken to make it known to him or them. Without undertaking to say what would constitute a making known to depositors of subsequent amendments or alterations within the meaning of Article 3, we think that neither the intestate nor any one representing him or his estate can be held bound by Article 26 of the amended by-laws under the circumstances disclosed in this case, and that so far as the defendant relies upon that by-law it must fail. See *Kimins* v. *Boston Five Cents Savings Bank*, 141 Mass. 33.

Digitized by Google

The question of identity having been settled in favor of the plaintiff, and the defendant substantially admitting the identity of the depositor with the plaintiff's intestate, and the court having found that the book had been destroyed, there would seem to be no good reason why, on general principles, the plaintiff should be required to furnish a bond of indemnity as a condition of payment by the defendant.

What we have said disposes, we think, of the objections urged by the bank to the rulings of the presiding justice and to the refusals to rule as requested. *Exceptions overruled.*

---

DENNIS CREAVIN & another *vs.* NEWTON STREET RAILWAY COMPANY.

Middlesex. March 23, 1900. — September 5, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Personal Injuries — Evidence justifying a Finding of Due Care.*

In an action for personal injuries occasioned to the driver of a covered express wagon and his employee by the collision thereof with an electric car, evidence on which the jury could find that both plaintiffs looked to see if a car was coming when, seated as they were in the wagon, they were fifteen feet from the track; that their view was obstructed until they reached that point; that they saw the car and each thought that it was then one hundred to one hundred and five feet away, and that in fact the car was then about one hundred feet away; that they thought they had ample time to cross the tracks, and for that reason drove across at a walk; and, finally, that the car was being driven at the rate of fifteen to seventeen miles an hour, in place of eight miles an hour as the city ordinance required, authorizes a finding that the plaintiffs thought that the motorman saw them and would look out for them, and that they were in the exercise of due care, whether their estimates were right or not; their estimates, as a matter of fact, being right.

TORT, for personal injuries occasioned to the plaintiffs by the collision of a covered express wagon on which they were riding with an electric car. Trial in the Superior Court, before *Hardy*, J., who directed the jury to return a verdict for the defendant; and the plaintiffs alleged exceptions, which appear in the opinion.



Digitized by Google

*M. J. Connolly & R. Levi*, for the plaintiffs.

*G. L. Mayberry*, (*T. J. Kenny* with him,) for the defendant.

LORING, J. The only question in this case is whether there was evidence that the plaintiffs were in the exercise of due care. The plaintiffs were injured by a collision between their wagon and an electric car. The plaintiff Creavin was an expressman, and was driving with the plaintiff Connors, who was employed by him, in an ordinary covered express cart, northeasterly up Pine Street to cross River Street in West Newton, at about half-past eight o'clock, on the evening of December 22. The electric cars run on the southerly side of River Street, close to the sidewalk on that side of the street. Pine Street intersects River Street at an angle of forty-five degrees. The electric car which struck the plaintiffs was going east; the plaintiffs' wagon was struck about the rear of the forward wheels; the body of the wagon was thrown to the right, and the horse and forward wheels were thrown to the left. It was a fair, starlight night. The plaintiffs were driving at a walk when they were struck.

There was evidence in this case on which the jury could have found that both plaintiffs looked to see if a car was coming when, seated as they were in the wagon, they were fifteen feet from the track; that their view was obstructed until they reached that point; that they saw the car and each thought that it was then one hundred to one hundred and five feet away, and that in fact the car was then about one hundred feet away; that they thought they had ample time to cross the tracks, and for that reason drove across at a walk; and, finally, that the car was being driven at the rate of fifteen to seventeen miles an hour, in place of eight miles an hour as the city ordinance required. These facts would authorize a finding that the plaintiffs thought that the motorman saw them and would look out for them, and that they were in the exercise of due care, whether their estimates were right or not. Moreover, it will be found by making the necessary computations that their estimates were right; that is to say, if the car was one hundred feet away when the plaintiffs seated in the wagon were fifteen feet from the track, the plaintiffs driving at the rate of three and one half miles an hour would have got across the tracks without a collision, if the car had come at the rate of

Digitized by Google

eight miles an hour; and, if the car came at the rate of sixteen miles an hour, a collision would have ensued, substantially as it did.

The case should have been submitted to the jury.

*Exceptions sustained.*

---

THOMAS J. KELLY & another, administrators, *vs.* JAMES M. MORRISON & another.

Suffolk. March 26, 1900. — September 5, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Partnership — Construction of Agreement — Equity — Discovery.*

A partnership, consisting of A., B., and C., which was a continuation of a previous partnership between A. and B., was formed for two years, each partner contributing a certain sum to the capital, and the profits and losses to be shared in certain proportions. The articles of partnership provided that the several contributions to the capital should be paid by the transfer to the new firm of the property belonging to the old firm; and that if either of the partners should die during the continuance of the partnership, the business might be carried on by the survivors, and the interest of the deceased partner in the property of the firm for all purposes should be taken to be "the balance standing to his credit as of the next preceding annual account taking of the stock, assets, and debts owing to and by the said firm." An annual account of the stock, assets, and debts of the old firm was taken on the day the new partnership began, showing a balance to the credit of each partner, and a portion of these assets was transferred to the new firm. A. died during the first year of the new partnership, and the business of the firm was continued by the other partners as the contributions of A. and B. The contribution to the new partnership made by C. was the amount then due to him as an employee of the old firm. *Held*, on a bill in equity to obtain A.'s share of the profits upon the basis of the proportional percentage fixed by the articles of partnership, that the account taken on the day the new firm was formed was adopted by that firm as its first "annual account taking," and was the "next preceding annual account taking" of that firm, within the meaning of the partnership articles, and determined the amount of A.'s interest in the partnership property.

A bill in equity by the administrator of the estate of a deceased partner against the other partners, to obtain the intestate's share of the profits of the partnership, will not lie also to obtain the exhibition of the books and papers of the firm, upon an allegation that the firm did business here and in another State, and that an official named threatened to assess and collect a tax from the plaintiff on the interest of the deceased partner in the property of the firm in that State

Digitized by Google

on the day of his death, and in order to ascertain the amount of such tax threatened to appraise the property there.

A bill for discovery of evidence to be used in defence of an action does not ordinarily lie against a person not a party to that action, and whose only relation to it is that of a witness.

BILL IN EQUITY, filed October 25, 1897, in the Superior Court, by the administrators *de bonis non* with the will annexed of the estate of Thomas Kelly, against James M. Morrison and Mary F. Maguire, executrix of the will of Thomas F. Maguire, to obtain Kelly's share of the profits of the partnership of Thomas Kelly and Company. Hearing before *Fessenden*, J., who reserved the case for the consideration of this court. The facts appear in the opinion.

*H. V. Cunningham*, for the plaintiffs.

*B. L. M. Tower*, for the defendants.

LORING, J. This is a bill by which the administrators *de bonis non* with the will annexed of the estate of Thomas Kelly seek to have the profits of the partnership, of which he was a member when he died, ascertained for the period between the formation of the partnership and the date of his death, and to have 51.66⅔ per cent thereof paid to them. At the time of his death Thomas Kelly was a member of the firm of Thomas Kelly and Company, consisting of himself, Thomas F. Maguire, and James M. Morrison. The firm was formed on December 1, 1892, and Kelly died on the thirty-first day of the following August. Kelly contributed $275,000, Maguire $75,000, and Morrison $7,831.57, to the capital of the partnership; they were to share profits and losses in the proportions of 51.66⅔ per cent, 25.83⅓ per cent, and 22.50 per cent, respectively. On the death of Kelly the business of the partnership, in place of being wound up, was continued by Maguire and Morrison under the thirteenth article of the partnership agreement,* which provided

* This article was as follows: "If either of the said partners shall die during the continuance of the said partnership his interest in the assets and property of the said firm shall be conclusively, finally and for all purposes taken to be the balance standing to his credit as of the next preceding annual account taking of the stock, assets and debts owing to and by the said firm, with interest thereon at the rate aforesaid from that time, less and deducting therefrom not only such money and property as he shall after such annual account have drawn from the firm, but also interest thereon at the

Digitized by Google

for such a continuance of the business, and also that: "If either of the said partners shall die during the continuance of the said partnership, his interest in the assets and property of the said firm shall be conclusively, finally, and for all purposes taken to be the balance standing to his credit as of the next preceding annual account taking of the stock, assets, and debts owing to and by the said firm," with interest at six per cent per annum. The partnership was to continue for two years from December 1, 1892, and, by the terms of article second of the partnership agreement, the several contributions to the firm capital mentioned above "shall be paid by the transfer to the firm hereby formed of the merchandise and other property belonging to the last firm of Thomas Kelly and Company to the extent of the amounts as above stated."

It appears that "an annual account of the stock, assets, and debts of Thomas Kelly and Company," referred to in the above article in the partnership agreement in question, "was taken December 1, 1892, and showed a balance to the credit of said Kelly of $293,264.18, of which sum $275,000 was placed to his credit, and the balance of $18,264.18 was withdrawn by him in various sums between December 1, 1892, and February 11, 1893; said account taking showed a balance to the credit of said Maguire of $78,667.85, of which sum $75,000 was placed to his credit, and the balance, $3,667.85, was withdrawn by him in various sums between December 9, 1892, and April 15, 1893. On December 1, 1892, there stood to the credit of James M. Morrison, as an employee of said firm, $7,831.57, which was placed to his credit."

Maguire, one of the surviving partners, was the sole executor

---

rate aforesaid from the respective times of such withdrawals, and all profits, expenses and depreciation and losses of the said firm occurring after such annual account, whether such losses shall arise from the failure of the firm's debtors to pay accounts or notes taken as good in such annual account, or from other causes, shall in that case belong to or be borne and paid, as the case may be, by the surviving partners alone, who may use the name, credit and entire capital of the firm for a term not exceeding fifteen months reckoning from the first day of the December previous to the death of the other partner, and who shall share the whole of the profits and losses made and incurred after such death in the proportion in which, before such death, they shared the balance of the profits and losses, after deducting such deceased partner's share."

Digitized by Google

of Kelly's will; and in the inventory of Kelly's estate he set down Kelly's interest in the partnership at $281,577.16. "This was the amount standing to the credit of said Thomas Kelly on the books of said firm of Thomas Kelly and Company on December 1, 1892, being $275,000 capital contributed by him on that date, with interest thereon to August 31, 1893, less the sums withdrawn by him between said December 1, 1892, and August 31, 1893." Thomas Kelly and Company, the successors of the firm in question, paid to Maguire, as executor of Kelly's will during Maguire's lifetime, $202,703.86. Maguire died on April 20, 1895, and Kelly and Company paid the balance with interest, amounting to $98,291.41, to the plaintiffs.

The plaintiffs' contention is that since Kelly died during the first year of the partnership there never had been a "next preceding annual account taking of the stock, assets, and debts owing to and by the said firm"; that a death during the first year was a contingency not provided for in the partnership articles; that there being no prescribed mode of arriving at the profits of the partner who dies during the first year, the general provision that he is to receive 55.66⅔ per cent should control; and this bill is brought to recover that share of the profits from the beginning of the partnership to the date of his death.

We are of opinion that this contention is not well founded. It appears that Thomas Kelly began the business of selling blankets by the wholesale, which was to be carried on by the firm in question, in 1862, thirty years before the date of the partnership in question; and "on January 1, 1866, the partnership of Thomas Kelly and Company was formed, under which style successive firms carried on said blanket business. In the year 1880, Thomas F. Maguire became a partner, the latter and said Kelly being the only partners until December 1, 1892, when said Morrison, who had been in the employ of all said firms, became a partner." It further appears that the partnership agreement of "the last firm of Thomas Kelly and Company" contained articles making substantially the same provision, (1) for an annual account of stock, and (2) for continuing the business in case of the death of either partner, and ascertaining the interest of the deceased partner, as is made in the partnership agreement in question.

Digitized by Google

The partnership of Thomas Kelly and Company by its terms was to last but two years; if the plaintiffs' contention is correct, the interest of a partner dying during the first year is to be ascertained in one way, and that of one dying in the second year of the partnership, in another way; but this is not contemplated by the provision that in case "either of the said partners shall die during the continuance of the said partnership," his interest for the year in question shall in all cases be the amount standing to his credit "as of the next preceding annual account taking of the stock."

It is strictly true, as the plaintiffs contend in their argument, that the old partnership of Thomas Kelly and Company was in contemplation of law dissolved, and that the partnership of Thomas Kelly and Company in question in legal contemplation was a new partnership. But it is equally true that the partnership in question was in fact made to carry on the business of the previous firm of the same name, its capital was paid in by a transfer of the assets of the old firm, and the interest of each partner in the new partnership had been ascertained by the annual account of stock taken by the old firm, on the same day and for the same purpose as that provided for in the articles of partnership in question, and that the provisions of the thirteenth article (the article in question) apply equally to each of the two years during which the partnership was to run. This was in fact an account of stock taken of the assets of the old firm, and of the interest in those assets of the persons who became the partners in the new firm, (treating Morrison's claim as a creditor of that firm as an interest therein to the amount of the debt due him,) and those assets were transferred to the new firm, and the interests of the partners in the new firm were ascertained by that account of stock. We think that this account of stock was adopted by the new firm as its first "annual account taking of the stock, assets, and debts owing to and by the said firm," and was the "next preceding annual account taking of the stock" of the new firm within the meaning of the thirteenth article.

The bill also contains a prayer "that the defendants be ordered and directed to exhibit said books, vouchers, papers, securities, and documents belonging to said firm"; this is based

Digitized by Google

on an allegation that the firm did business in New York as well as in Boston, and that the comptroller of the State of New York "threatens to assess and collect a tax from your petitioners on the interest of said Thomas Kelly, deceased, in the property and assets of said firm in said State of New York on said thirty-first day of August, 1893, under the laws of said State of New York. And in order to ascertain the amount of said tax threatens to appraise said property and assets then and there in New York as aforesaid."

So far as this prayer is concerned, the bill is a bill for discovery. Apart from the objection that the bill is multifarious, it is not good as a bill of discovery. There is no allegation that there is any law of the State of New York making the plaintiffs who are administrators appointed in this State liable for the interest of Thomas Kelly in the firm's assets in New York; there is no allegation that any suit has been brought by the comptroller; and, finally, a bill for discovery of evidence to be used in defence of an action does not ordinarily lie against a person not a party to that action and whose only relation to it is that of a witness.

The entry must be, *Bill dismissed.*

---

ALVAH S. MORRISON & another *vs.* ROGER LAMSON & another.

Norfolk. March 28, 1900. — September 5, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Construction of Order for Payment of Money — Effect of Acceptance — Consignment.*

A written order addressed to A., who accepts it, directing him to pay to B., "from equities on hosiery consigned to you," a sum named, "and charge the same to our account," and signed by C., is a direction to pay only from the fund designated, which is the sum to become due to C. by reason of the consignment made by him to A. when the transaction shall be closed, and is not limited by the net proceeds of sales improperly made, but includes whatever sum should have been realized from sales made in accordance with the terms of the consignment.

Digitized by Google

CONTRACT. The declaration alleged that the Whetstone Hosiery Company made a bill of exchange, a copy of which, with the indorsements thereon, was annexed, payable to the order of the plaintiffs; that the defendants, the drawees named therein, for a valuable consideration duly accepted the same, and the plaintiffs were the owners and holders of the bill; and that the defendants owed the plaintiffs the amount of the bill and interest thereon, except the sum of $379.70, which had been paid by the defendants to the plaintiffs.

The copy annexed was as follows: "Brattleboro, Vt., June 4th, 1897. Messrs. Roger Lamson & Co., New York, N. Y. Gentlemen: Pay to A. S. Morrison & Brothers from equities on hosiery consigned to you, six hundred and twelve and 84-100 dollars with interest from June 1st and charge the same to our account. $612.84. Whetstone Hosiery Co. Accepted: Roger Lamson & Co.," and contained the following indorsement: "New York, Aug. 30th, '97. Received on account, three hundred and seventy-nine and 70-100 dollars."

The first paragraph of the answer admitted the signatures to the order declared on, but denied each and every other allegation in the declaration.

The second paragraph denied that the defendants received any consideration for accepting the order, but averred that it was done solely for the accommodation of the plaintiffs, to assist them in obtaining, so far as it might, payment of a certain alleged indebtedness due to them from the Whetstone Hosiery Company, the drawer of the order.

The third paragraph alleged that prior to the drawing of the order, namely, in or about January, 1896, the Whetstone Hosiery Company consigned to the defendants, who were commission merchants doing business in the city of New York, a large quantity of hosiery to be sold by them, upon the agreement that, after taking out of the proceeds of the sale all money advanced upon the goods to that company by the delendants, and all money paid for insurance, freight, and other expenses upon the goods by the defendants, and also a commission for their services in selling the goods, the balance or equity remaining, if any, should be paid by the defendants to the company; that the words of the order, "from equities on hosiery consigned to you,"

Digitized by Google

referred to such balance or equity; that in the latter part of June, 1896, the plaintiffs presented the order to the defendants, who accepted the same by writing across the face thereof the words "accepted, Roger Lamson & Co."; that at the time of the acceptance the defendants had made large advances on the goods to the company, and had paid a large amount of money for insurance, freight, and other expenses on the goods, and had sold only a part of the goods, so that there was then no money or equity in the hands of the defendants belonging to the company, and the amount of the equity or balance that would remain when all the goods were sold, if any, was unknown, and at the time of such acceptance all the facts hereinbefore set forth were known by the plaintiffs, having been stated by the defendants to them; that on August 1, 1897, the defendants closed out the goods by sale, and the equity left in their hands, after deducting from the proceeds of sale the advances, expenses, and commission, as above set forth, was $377.82; that the plaintiffs retained the order until August 30, 1897, when they presented it to the defendants and demanded payment thereof; and that the defendants then paid over to the plaintiffs the full amount of the equity in their hands, being said sum of $377.82, together with interest thereon from August 1, 1897, being in all the sum of $379.70.

The plaintiffs demurred to each paragraph of the answer, on the ground that it did not state a legal defence to the declaration in accordance with Pub. Sts. c. 167.

In the Superior Court the demurrer was sustained as to the second paragraph of the answer, and overruled as to the other paragraphs; and the plaintiffs appealed to this court.

At the trial, before *Sherman*, J., without a jury, the plaintiffs introduced in evidence the report of an auditor, who found the following facts: The order was accepted by the defendants on August 7, 1896, at their place of business in New York City, by writing across the face of the order their firm name. The drawer consigned to the defendants certain hosiery to be sold on commission, the proceeds to be accounted for, and the balance, after deducting freight charges, advances made by the defendants, interest and commissions, was, by the terms of the consignment, to be paid by the defendants to the hosiery company. This balance is the "equities on hosiery" named in the order.

Digitized by Google

At the time the defendants accepted the order they had not sold all of the hosiery consigned to them, and did not sell and deliver it all until July, 1897.

The sum of $379.70 was paid on August 30, 1897, by the defendants on account of and indorsed upon the order; and this action is to recover the difference between that sum and the amount of the order.

The plaintiffs contended that the hosiery sold by the defendants after the order was accepted was sold at a sacrifice, at prices less than the defendants had a right to sell for, and that they could recover at prices the defendants ought to have received.

The defendants contended that there was a depression in market values of hosiery goods; that they sold for the market price and for all they could get; that they had the right so to sell as between themselves and both the consignors and the plaintiffs; and that the plaintiffs could recover only on the basis of prices actually obtained by the defendants.

It was admitted that in the computation of interest an error against the plaintiffs was made by the defendants to the amount of $4.22, and the auditor found that the payment made upon the order on August 30, 1897, should have been increased that amount.

The hosiery was consigned to the defendants to be sold in the ordinary course of business, and invoices sent to them with each shipment stated prices; but such invoice prices were not limitations of the defendants' prices of sale. Statements were regularly sent by the defendants to the hosiery company, some of which showed sales to have been made at less than the invoice prices, and after acceptance of the order irregular statements were made to the plaintiffs.

After the order was accepted the defendants sold part of the hosiery at less than market prices, and realized less from sales than they were under obligation to realize, both to the consignors and to the plaintiffs.

The auditor found that the plaintiffs were entitled to recover the sum of $114.86, with interest, making a total of $119.46.

The plaintiffs requested the judge to give the following rulings: "1. On the evidence the finding should be for the plain-

Digitized by Google

tiffs for the balance remaining unpaid on the order, and interest. 2. If the court finds the facts as stated by the auditor, the plaintiffs are entitled to recover the balance unpaid on the order, and interest. 3. On the evidence the plaintiffs are entitled to recover not less than the difference between the amount paid and the sum which the defendants should have received for the goods over and above the advanced expenses," etc.

The defendants requested the judge to give the following rulings: "1. The plaintiffs cannot recover upon the pleadings on the basis of the price that the defendants ought to have received for the goods. 2. The plaintiffs can recover upon the pleadings on the basis only of the price actually obtained by the defendants for the goods. 3. The plaintiffs are not entitled to a finding for more than $4.22, and interest. 4. The plaintiffs cannot recover more than the amount allowed them by the auditor's report."

The judge declined to give the first, second, and third of the rulings requested by the defendants, and found for the plaintiffs in the sum of $124.53; and the defendants alleged exceptions.

The case was submitted on briefs to all the justices.

*E. I. Baker*, for the defendants.

*C. H. Sprague*, for the plaintiffs.

BARKER, J. 1. The natural meaning of a direction to pay from a designated fund is to pay only from that fund. See *Josselyn* v. *Lacier*, 10 Mod. 294, 317; *Jenny* v. *Herle*, 1 Stra. 591; *Macleed* v. *Snee*, 2 Stra. 762; *Wheeler* v. *Souther*, 4 Cush. 606; *Proctor* v. *Hartigan*, 139 Mass. 554. The added direction to "charge the same to our account" is as consistent with this meaning as with that for which the plaintiffs contend. In either case the sum paid is to be charged to the drawers' account. In the present order the words "from equities on hosiery consigned to you" seem to us to be a condition that the payment is to be made only out of that fund, and not merely a statement of the origin of the debt between the drawer and the drawee, or a mere reference to a fund designated for the drawee's reimbursement. See *Haussoulier* v. *Hartsinck*, 7 T. R. 733; *Wells* v. *Brigham*, 6 Cush. 6. The direction is not to charge the payment to a particular fund, as was the direction in the drafts dealt with in *Whitney* v. *Eliot National Bank*, 137 Mass. 351, but

Digitized by Google

to make the payment from a fund, and to charge it to the drawer. In *Newhall* v. *Clark*, 3 Cush. 376, *Cook* v. *Wolfendale*, 105 Mass. 401, *Somers* v. *Thayer*, 115 Mass. 163, *Russell* v. *Barry*, 115 Mass. 300, the time of payment of the orders was conditional, and it was upon the ground that the time of payment had not arrived that the defendant in *Proctor* v. *Hartigan*, 143 Mass. 462, finally prevailed. Giving this construction to the language of the order, the facts alleged in the answer were all material to show the amount due, and whether time for payment had arrived. The acceptance was an agreement to comply with the request expressed in the order, and that request was to be construed in the light of the circumstances existing when the order was given, and the later transactions were material in determining the amount of the fund.

2. It follows from the construction which we give to the order that it was an assignment of the rights of the hosiery company against the defendants growing out of the consignment mentioned in the order, and that by the acceptance the defendants became bound to pay to the plaintiffs so much of the sum of $612.84 as, but for the order, would have been payable to the drawer when the "equities" should be adjusted. The fund designated was the sum to become due to the drawer by reason of the consignments of hosiery made by the drawer to the defendants when the transaction should be closed, and it was an "equity." It was not limited by the net proceeds of sales improperly made, but included whatever sum should have been realized from sales made in accordance with the terms of the consignment. The evidence justified the finding for the plaintiffs.

There was no exception to the introduction of evidence. The declaration set out the order by copy, and it would be too strict to hold that it did not authorize the finding.

*Plaintiffs' demurrer overruled; defendants' exceptions overruled.*

Digitized by Google

## MARIA L. WHITE *vs.* LEVI A. DAME & others.

Suffolk. January 17, 1900. — September 6, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Mortgage — Assignment — Equity.*

The evidence in this case, which was a bill in equity to redeem land from a mortgage alleged to have been assigned by the plaintiff to the defendant as collateral security, warranted a finding that the assignment was absolute.

BILL IN EQUITY, filed August 19, 1898, against Levi A. Dame, Oliver H. Flanders, and Jason E. Bailey, to redeem land in Milton and Quincy from a mortgage. Hearing before *Hammond*, J., who entered a decree, from which the plaintiff appealed to the full court. The facts appear sufficiently in the opinion.

*C. F. Donnelly & A. E. Gage*, for the plaintiff.

*T. W. Proctor*, for the defendant Dame.

MORTON, J. This is a bill in equity to redeem land from a mortgage assigned, as the bill alleges, by the plaintiff at the request and for the accommodation of the defendant Flanders, and without any other consideration therefor, to the defendant Dame, as collateral security for the payment of a note of $1,200 given by Flanders to Dame. The bill also alleges that the mortgage was subsequently assigned by Dame to the defendant Bailey, that both Dame and Bailey took their respective assignments with full knowledge that the plaintiff was the equitable owner of the mortgage, and that Dame had full knowlege that the mortgage was assigned to him as collateral security and not absolutely. There are also allegations that the defendant Dame released to Flanders, who, as trustee, was the owner of the equity of redemption, certain lots in violation of the plaintiff's rights as the equitable owner of the mortgage.

The case was heard by a single justice, who entered a decree dismissing the bill with costs as to Dame, allowing the plaintiff to redeem from Bailey on payment on or before a certain date of the amount due him, otherwise the bill to be dismissed with costs as to him, and directing the bill to be retained as against

Digitized by Google

Flanders for the purpose of assessing the damages arising from the non-performance of a written agreement found to have been entered into between him and the plaintiff whereby he agreed to pay the note from Flanders to Dame, to secure which it was recited in the agreement the mortgage was assigned to Dame, and to cause the mortgage and mortgage note to be reassigned to the plaintiff.

The testimony was taken by a commissioner appointed for the purpose, and is before us. So much of the decree as relates to Bailey was entered by consent of the plaintiff. She has not argued that that portion of it which relates to Flanders is not correct. The only question which she has argued relates to the disposition of the bill as against Dame, and we assume, therefore, that the only objection on the part of the plaintiff to the decree is to that portion which directs the bill to be dismissed with costs as against Dame.

The plaintiff's right to relief as against Dame depends on her showing that she assigned the mortgage to him as collateral security, and that he took it as collateral security and not absolutely. On these points the evidence was contradictory. There was testimony tending to show that Dame had no knowledge of the agreement between Flanders and the plaintiff; that the assignment as at first prepared had in it the words "as collateral security," and that Dame refused to accept an assignment in that form or to accept anything less than an absolute assignment; and that the plaintiff's husband, who was present and acting for her, agreed that the mortgage should be assigned absolutely to Dame, and it was done with a provision in the instrument of assignment that the same should be without recourse in any event to the assignor or her legal representatives. Whatever as between Flanders and Dame may have been the effect in regard to the mortgage of the transaction which was entered into, it is plain, we think, that from the evidence above referred to, and from the other testimony in the case, that the court was warranted in finding that as between the plaintiff and Dame the assignment was intended to convey, and did convey, absolutely all of the rights of the plaintiff, and that Dame refused to accept an assignment on any other terms. It follows that the decree must be affirmed. *So ordered.*

Digitized by Google

COLVER J. STONE, trustee, *vs.* PARKER N. JENKINS.

Suffolk. March 13, 1900. — September 6, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & BARKER, JJ.

*Bankruptcy — Maintenance of Action by Trustee after Discharge for Benefit of Bankrupt.*

After a trustee in bankruptcy has been discharged as trustee and the estate has been closed up and settled, he may maintain an action for the benefit of the bankrupt with the bankrupt's consent.

TORT, by the trustee of the estate of a bankrupt, under U. S. St. July 1, 1898, for the conversion of nine horses, the property of the bankrupt. The horses were attached within four months next prior to the filing of the petition and to the adjudication in bankruptcy.

At the trial in the Superior Court, before *Hopkins*, J., the defendant requested rulings that upon all the evidence the plaintiff could not recover, and that having been discharged as trustee, and the estate having been closed up and settled, he could not maintain the action. The defendant also asked a ruling that, if the plaintiff could recover at all, he could not recover for four horses, in which the bankrupt had a special property.

The judge refused to give any of the requests, and ruled that the plaintiff might recover the market value of all the horses; and the defendant excepted.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

*C. F. Eldredge*, for the defendant.

*J. J. McCarthy*, for the plaintiff.

MORTON, J. This is an action of tort by the plaintiff, as trustee in bankruptcy of one Morris, to recover for the conversion of certain horses, in some of which, when he was adjudged bankrupt, Morris had a special property, and of others of which he was the general owner. Before the trial, Morris had made an offer of composition which had been confirmed, and an order had been made discharging the trustee and closing the affairs of the estate. At the trial, the defendant asked certain rulings,

Digitized by Google

which were refused. There was a verdict for the plaintiff; and the case is here on the defendant's exceptions to the rulings that were given and to the refusals to rule as requested.

The only question which has been argued before us is the right of the plaintiff to maintain the action after he was discharged as trustee and the estate was closed up and settled. Other questions raised by the defendant must be deemed to have been waived. It is stated in the defendant's brief that he introduced no evidence, but relied on the ground that the plaintiff no longer could maintain the action in his representative capacity. But for aught that appears in the bill of exceptions the case was fully tried.

When the right of action accrued, Morris had been adjudged bankrupt, and upon the appointment of the plaintiff as trustee the right of action vested in him, and suit was properly brought by him in his own name. When the offer of composition was confirmed and the order made discharging the trustee and closing up the estate, the property in the trustee's hands, including choses in action belonging to the bankrupt estate, vested by force of the statute in Morris. U. S. St. July 1, 1898, c. 541, § 70. We have, therefore, a case in which the right of action was in the trustee when the suit was begun, but has become vested during the pendency of the action in the bankrupt. In such a case it would seem to follow, either that the trustee should be allowed with the consent of the bankrupt to prosecute the action for his benefit, or the bankrupt should be allowed to come in and prosecute it in the name of the trustee on such terms as the court might deem reasonable, or the suit should be amended so that the action should proceed thenceforward in the bankrupt's name. If neither one of these things were done, there would seem to be no good reason why a discontinuance should not be ordered. *Cutts* v. *Parsons*, 2 Mass. 440. But it would serve no useful purpose to compel the plaintiff to discontinue and to oblige the bankrupt to bring an action in his own name; and such a rule might enable the defendant under some circumstances, though not perhaps in this case, to interpose as a defence the statute of limitations, or some technical matter which he could not otherwise have availed of. In *Mayhew* v. *Pentecost*, 129 Mass. 332, it was held that an action to recover a debt due before his bank-



Digitized by Google

ruptcy might be brought by the bankrupt after the bankruptcy, with the consent and for the benefit of the assignee in bankruptcy. *E converso* we do not see why an action duly brought by an assignee or trustee in bankruptcy may not be maintained in his name with his consent by the bankrupt for his benefit after the cause of action has become vested in him, or may not be so maintained by the assignee or trustee with the consent of the bankrupt. See *Commonwealth* v. *Phillipsburg*, 10 Mass. 78; *Holten* v. *Cook*, 12 Mass. 574; *Stone* v. *Hubbard*, 7 Cush. 595; *Robinson* v. *Hall*, 11 Gray, 483; *Gerrish* v. *Gary*, 1 Allen, 213; *Hallett* v. *Fowler*, 10 Allen, 36; *Herring* v. *Downing*, 146 Mass. 10.

There is nothing to show that that is not the situation in the case before us. It is immaterial to the defendant to whom he pays the amount found due, so long as he is not compelled to pay it twice; and if it appears that the action is prosecuted in the name of the plaintiff for the benefit of Morris, either by the plaintiff with his consent or by him with the plaintiff's consent, he will be protected from such liability. *Mayhew* v. *Pentecost*, *ubi supra*. A judgment recovered under such circumtances will be a bar to any other suit for the same cause of action. If the defendant is apprehensive that the status of the case does not sufficiently appear of record, the matter can be rectified by the proper application to the Superior Court. *Southern Express Co.* v. *Connor*, 12 Nat. Bankr. Reg. 53. But no such objection has been urged, and as the case stands we think that the exceptions must be overruled.

*So ordered.*

Digitized by Google

# NATIONAL GRANITE BANK *vs.* THEODORE H. TYNDALE, administrator.

## SAME *vs.* SAME.

Norfolk. March 16, 19, 1900. — September 6, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Promissory Note made by Wife to Order of Husband — Original Contract — Money lent or Money had and received — Equity — Estoppel — Allegations of Bill.*

A promissory note, signed by a married woman, payable to the order of her husband, and indorsed by him, having been avoided by her, the holder can resort to the original contract and maintain an action on the common counts for money lent or money had and received.

Equity will not enforce, by means of the doctrine of equitable estoppel, a contract between husband and wife in the case of a promissory note signed by her, payable to his order and indorsed by him; and in this bill in equity there are no sufficient allegations to constitute the ground of an estoppel.

A party cannot be relieved in equity, by reason of an estoppel, any more than at law from the effects of a positive rule of law.

THE FIRST CASE was an action upon three promissory notes, each for the sum of $5,000, in the form stated in *National Granite Bank* v. *Whicher*, 173 Mass. 517. The defendant is the administrator of the estate of Isabella S. Whicher. The declaration contained counts upon the notes and also counts for money loaned to the defendant's intestate, for money had and received, etc.

At the trial in the Superior Court, before *Gaskill*, J., the plaintiff called the attention of the judge to the fact that the defendant had set up in his answer to the counts upon the promissory notes the defence that the same were made payable to the husband of the defendant's intestate, and were therefore void; that the plaintiff had brought a suit in equity against the defendant to restrain him from setting up said defence, which suit was pending; and that the defendant in equity should be estopped from setting up said defence. The judge ruled that the plaintiff was not entitled to avail itself, in answer to the defence alleged by the defendant, of the facts alleged in the bill,

Digitized by Google

because the facts would not entitle the plaintiff to be absolutely and unconditionally relieved in equity against that defence. The plaintiff excepted.

The plaintiff then offered to show that on December 29, 1891, the date of the execution of the notes, it loaned to the defendant's intestate $15,000, and that at the same time the defendant's intestate gave the plaintiff three promissory notes for $15,000, payable to the order of her husband, T. A. Whicher, and indorsed by him and by L. E. Whicher and by Edward Whicher, being the notes in question; and that subsequently the defendant's intestate repudiated the notes on the ground that the same, having been made payable to her husband and indorsed by him, were void; that the plaintiff had expressly refused to make the loan to L. E. Whicher, T. A. Whicher, and Edward Whicher, or on their individual credit, and made the loan only to the defendant's intestate and on her credit.

The judge ruled that on such a showing the plaintiff could not recover on the common counts as for money loaned or money had and received, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

THE SECOND CASE was a bill in equity to enjoin the defendant from setting up the defence, in the above action at law, brought against his intestate and which he has come in to defend, that the notes therein sued upon were made by the intestate payable to the order of her husband, the contention being, in substance, that the defendant's intestate, having received and kept the proceeds of the notes, was estopped in equity to deny their validity. The defendant demurred to the bill, assigning as ground therefor, among other things, want of equity. The Superior Court sustained the demurrer and dismissed the bill, and the plaintiff appealed to this court.

*R. M. Morse*, (*C. H. Hanson* with him,) for the plaintiff.

*S. H. Tyng*, (*J. P. Prince* with him,) for the defendant.

MORTON, J. These two cases were argued together. The first is an action at law, and was before this court on the defendant's exceptions in 173 Mass. 517, and it was there held that the maker of the notes being a married woman, and the notes being made payable to the order of her husband and indorsed by him, no action could be maintained on them against her. It

Digitized by Google

comes before us now on exceptions by the plaintiff to a ruling by the presiding justice that upon the plaintiff's offer of proof an action could not be maintained against the administrator on the common counts for money lent or for money had and received, and to a ruling that the plaintiff was not entitled to avail itself of the facts set up in the bill in equity in answer to the defence that the notes were void because made payable to the husband of the defendant's intestate. The plaintiff offered to show that on December 29, 1891, it lent the defendant's intestate $15,000, and that at the same time the defendant's intestate gave the plaintiff three promissory notes for $15,000, payable to the order of her husband and indorsed by him and by two other parties; that subsequently the defendant's intestate repudiated the notes on the ground that, having been made payable to her husband and indorsed by him, they were void; and that the plaintiff had expressly refused to make the loan to the other parties or on their individual credit, and made the loan only to the defendant's intestate and on her credit.

We think that the ruling was erroneous. The offer was to show that the loan was made to the defendant's intestate and on her credit. This was consistent with the form of the note, of which she was the maker, and of which the other parties were, as between them and the bank, the indorsers. *Lewis* v. *Monahan*, 173 Mass. 122. The fact that the note was declared void as to her did not destroy the original transaction or avoid the debt created by the loan to her. *Walker* v. *Mayo*, 143 Mass. 42. *Sutton* v. *Toomer*, 7 B. & C. 416.

If the other parties to the note had been co-makers with her, and the loan had been made to all of them, and the note had afterwards been avoided by one of them, there would seem to be no doubt that the payee could have maintained an action against all of them for money had and received or money lent. *Leonard* v. *First Congregational Society in Taunton*, 2 Cush. 462. In such a case, the note having been received on the faith that it was the valid note of all, the payee would be "warranted in treating it as a nullity, and resorting to the original contract." *Leonard* v. *First Congregational Society in Taunton*, *ubi supra*. *A fortiori* ought that to be the case when the liability of the other parties is, as here, collateral and the action is brought against the maker

Digitized by Google

alone. It is true that the plaintiff could have treated the note as valid as against the other parties, and that if the plaintiff had sued and recovered against the last indorser, for instance, the husband might have been estopped in an action against him by a subsequent indorser to deny the validity of the note. *Roby* v. *Phelan*, 118 Mass. 541. But this action is not against the indorsers, and the counts that we are considering are not upon the note. The only use of the note which the plaintiff can make in relying on those counts is as evidence tending to show the terms on which the loan was made to the defendant's intestate. It cannot recover upon the note and the common counts both; and so far as it relies upon the common counts it must be taken to rely upon the original contract with the maker of the note, and, therefore, to have elected to treat the note as a nullity. In such a case the plaintiff would have no ground of recovery against parties whose only liability as between them and the bank is that of indorsers on the note.

The plaintiff contends, however, that it is entitled to be relieved in equity against the defence that the notes are void because made payable by the defendant's intestate to her husband. Its contention is, in substance, that the defendant's intestate, having received and kept the proceeds of the notes, is estopped in equity to deny their validity. But a party cannot be relieved in equity, we think, by reason of an estoppel any more than at law, from the effect of a positive rule of law. It is the rule of law that controls the conduct of parties, not the conduct of parties the rule of law. To hold otherwise would be to permit parties to set aside at their pleasure, with the aid of a court of equity, the rule of the common law which has been declared and recognized by the Legislature and by this court that contracts between husband and wife are void. It is true that under some circumstances, as, for instance, in the case of trusts and contracts made in contemplation of marriage, contracts between husband and wife have been enforced in equity. See *Frankel* v. *Frankel*, 173 Mass. 214. But in this Commonwealth, whatever may be the rule elsewhere, it never has been held that validity could be given to contracts between husband and wife, or in the analogous case of contracts made during minority, by means of the doctrine of equitable estoppel. See

Digitized by Google

*Fowle* v. *Torrey*, 135 Mass. 87; *Baker* v. *Stone*, 136 Mass. 405; *Woodward* v. *Spurr*, 141 Mass. 283; *Clark* v. *Patterson*, 158 Mass. 388.

Moreover, there is no allegation in the bill of any conduct or representation, fraudulent or otherwise, on the part of the defendant's intestate whereby the plaintiff was induced to take the notes and part with its money to her, and thus the very foundation of an estoppel, equitable or otherwise, fails. It is consistent with the allegations in the bill that the plaintiff knew that the defendant's intestate was the wife of the payee, and acted in regard to the transaction on its own knowledge. It is manifest that the fact that the notes are void does not of itself entitle the plaintiff to relief. Equity does not undertake to afford relief in all cases where contracts are for any reason void in the form in which they have been entered into.

The result is that in the action at law we think the exceptions should be sustained, and that in the bill in equity the decree sustaining the demurrer and dismissing the bill with costs should be affirmed. *So ordered.*

---

CHARLES E. EDGERLY *vs.* JOHN H. LAWSON & another.

Suffolk. March 9, 1900. — September 8, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, & LATHROP, JJ.

*Promissory Note — Action — Transferrer — Bona fide Holder before Maturity for Value — Guarantor — Indorser — Action in Name of Person to whom Promise is made.*

Even if it be true that a promissory note was transferred to the plaintiff after maturity and without consideration, for the purpose of bringing an action in this State, still he can maintain the action in the right of his transferrer, if the latter is a *bona fide* holder, before maturity, for value.

One who writes on the back of a promissory note, "I hereby guarantee the payment within note," is a guarantor and cannot be sued as an indorser. To maintain the action against him as guarantor it must be brought in the name of the person to whom the promise was made.

Whether St. 1897, c. 402, entitled "An Act relative to actions upon assigned claims," is applicable to this case, which is one of guaranty of payment of a

Digitized by Google

promissory note, the question not having been raised in the court below or in this court, and the statute having been passed subsequently to the guaranty and after the date of the writ, *quære*.

CONTRACT, upon a promissory note, dated November 4, 1893, payable January 1, 1896, with interest from July 1, 1895, to the order of Charlotte E. Edgerly, and signed by the first named defendant. On the back of the note was written: "We hereby guarantee the payment within note. Redding & Co." The note was also indorsed in blank by the payee. The plaintiff sued as holder. Writ dated January 15, 1896. The declaration contained four counts. The first was against the first named defendant as maker. The second was against the other defendants as indorsers. The third combined the first two counts. The fourth was on an account annexed.

At the trial in the Superior Court, before *Sheldon*, J., the plaintiff put in evidence the note and the report of an auditor in his favor, and rested. The defendant thereupon asked the court to rule that on the auditor's report the plaintiff was not entitled to a verdict. The court refused so to rule; and, by consent of parties, instructed the jury to return a verdict for the plaintiff on the first three counts, for $610.50. The defendants alleged exceptions to the refusal of the court to rule as above stated. The nature of the auditor's report appears in the opinion.

*G. N. Harris*, for the defendants.

*G. C. Abbott*, for the plaintiff.

LATHROP, J. The auditor has found that the payee of the note was a copartner in the firm of Redding and Company, in the business of manufacturing and selling an article known as Redding's Russia Salve; that the note declared on was given in part payment for the payee's interest in the firm, and that she at the same time assigned all her interest in the business to the first named defendant, who signed the note as maker, and that he afterwards assigned said interest to the other defendants without consideration, except the indorsement of the note declared on and other notes given at the same time and as part of the same transaction.

The auditor further finds that the interest of the payee in the business passed from her to Lawson on the delivery of the notes

Digitized by Google

above referred to, and $6,000 in money given as a part of the consideration of said transfer. Lawson does not appear to have been a partner in the firm.

1. The defendants first contend that there was no evidence that the person who transferred the note to the plaintiff was a *bona fide* holder for value. It appears from the auditor's report that he found that this person was a *bona fide* holder for value before maturity. The auditor has not reported the evidence; and it cannot be said that his finding was wrong. So far as the plaintiff is concerned, if it be true, as the defendants contended before the auditor, that the note was transferred to him after maturity and without consideration, for the purpose of bringing an action in this State, still he can maintain the action in the right of his transferrer, who has been found by the auditor to be a *bona fide* holder, before maturity, for value. *Spofford* v. *Norton*, 126 Mass. 533. *Regina Flour Mill Co.* v. *Holmes*, 156 Mass. 11. See also *Roberts* v. *Lane*, 64 Maine, 108. So far as the defendant Lawson is concerned we see no reason why he is not liable.

2. As to the guarantors, a more serious question arises. They are sued as indorsers of the note, and it is clear under our decisions that they are not indorsers but guarantors. It is also clear that a guarantee is here considered a non-negotiable chose in action, although written by a third person upon the back of a negotiable promissory note. *Taylor* v. *Binney*, 7 Mass. 479. *Upham* v. *Prince*, 12 Mass. 14. *True* v. *Fuller*, 21 Pick. 140. *Tuttle* v. *Bartholomew*, 12 Met. 452. *Belcher* v. *Smith*, 7 Cush. 482. See also *Baldwin* v. *Dow*, 130 Mass. 416.

To maintain the action against the guarantors at common law, the plaintiff must sue in the name of the person to whom the promise was made, namely, Mrs. Edgerly.

We express no opinion upon the question whether the St. of 1897, c. 402, entitled "An Act relative to actions upon assigned claims," is applicable to this case, as this question was not raised in the court below or in this court. The statute was passed subsequently to the guaranty, and after the date of the writ. See *Waldron* v. *Harring*, 28 Mich. 493.

The result is that, as to the defendant Lawson, the exceptions are overruled; and that the exceptions of the other defendants are sustained. *So ordered.*

Digitized by Google

## ROBERT O. TREADWELL *vs.* JOHN P. TREADWELL.

Suffolk. March 19, 1900. — September 12, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, HAMMOND, & LORING, JJ.

*Trustee and Cestui que trust — Debt — Commission charged by Trustee — Suit by Cestui que trust for Account and Payment — Statute of Limitations.*

When a trustee with the full knowledge of the *cestui que trust* has taken all the proceeds of the trust property and has become his debtor for it, the whole transaction has been reduced in fact to a debt due from the trustee to the *cestui que trust*. When this is followed by the financial ruin of the trustee, there is no room to hold that the trust relation also continues, because by the understanding of the two the debt was to be paid when a favorable investment should be found. In such a case there is no trust property except the debt due from the trustee, which cannot be collected, and there is no occasion to end the trust, for it has been already changed into a debt; and the fact that the trustee charged a commission of five per cent on income is not so far inconsistent as to preclude the conclusion that the *cestui que trust* became a creditor of the trustee, there having been much confusion in the minds of both parties throughout the transactions.

A suit in equity by a *cestui que trust* against a trustee for an account and for the transfer and payment of both principal and income, brought eighteen years after the transaction between them had been reduced to a mere chose in action, is barred by the statute of limitations.

BILL IN EQUITY, inserted in writ and brought in this court, dated May 13, 1895, to require the defendant to render an account of his administration of a trust, and to pay over to the plaintiff the principal thereof and all income which had or should have been derived therefrom.

The case was referred to a master, the exceptions to whose report were overruled, and the report was confirmed on October 24, 1898. The bill was thereafter dismissed; and the plaintiff appealed. The facts appear in the opinion.

*R. Stone*, for the plaintiff.

*S. Lincoln*, for the defendant.

LORING, J. This case comes up on an appeal from a decree overruling the plaintiff's exceptions to the master's report and dismissing the bill. The only questions argued in this court are the two questions, whether the plaintiff has been guilty of such unreasonable delay, either in making a demand or in bring-

Digitized by Google

ing this action, that he ought not to be allowed to recover, and whether the statute of limitations is a bar to this action.

From the findings made by the master, it appears that on the 30th day of September, 1869, the plaintiff and the defendant, who are brothers, executed an indenture of trust, by which the plaintiff transferred to the defendant certain personal property of the face value of $23,500, in trust to sell, invest, and hold the same for the benefit of the plaintiff, until the indenture was revoked by a writing to that effect recorded in the Suffolk Registry of Deeds; the personal property so transferred to the defendant consisted of four notes, five railroad bonds, and two bonds of the United States of America. The investments which by the indenture of trust it was contemplated should be made were investments in real estate.

Two days after the execution of the indenture the four notes were paid, and $17,000, the amount thereof, together with $300.09, interest, was received by the defendant. On June 6, 1872, two years and eight months after the date of the indenture of trust, the United States bonds were sold, and the proceeds, amounting to $1,681.87, were received by the defendant; and three months later, or nearly three years after the date of the indenture, the railroad bonds were paid at maturity to the defendant and the proceeds, $4,985, were also received by the defendant. In 1872, and after this sale, the defendant invested $6,011.77 of the trust funds in discounting a note of Richardson, Page, and Company, due in six months; this was repaid seven months afterward, with interest for the time it was overdue. With the exception of this investment all the money received from the collection and sale of the personal property transferred to the defendant by the indenture of trust was used by him in his own investments.

The defendant had on his books a ledger account with the plaintiff which had been begun before the indenture of September 30, and was continued after that date without change. In this account the defendant was credited with the proceeds of the four notes, five railroad bonds, and two United States bonds as they were received, and with interest at seven per cent on the daily balance of cash in the defendant's hands; in this account was also entered the interest on the original investments, and

Digitized by Google

on the only new investment in the Page-Richardson note, while those investments were held by the defendant. The defendant also charged the plaintiff with five per cent commission on the income of the trust property collected by him, including in that income the interest on the daily balance due from himself. In the same account there were entries crediting the defendant with sums due from other sources, and charging him with payments made generally on his account. The defendant sent the plaintiff regular statements of this account from 1869 up to and including June, 1877. These statements were usually sent once in three months, and were a complete transcript of the plaintiff's account as it stood on the defendant's books.

Except in the years 1869 and 1870, the payments made by the defendant to the plaintiff "were uniformly less than the total amounts carried to his credit, so that the amount standing to the credit of the plaintiff steadily increased, and by the end of the year 1877 it amounted to $29,086.99, which was more than the proceeds of the original securities by nearly $5500." "By the end of the year 1877, they [the defendant's investments] were entirely gone, and the defendant was financially ruined;" in 1877 all remittances from the defendant to the plaintiff stopped, and the plaintiff was made aware, by the stopping of these remittances, "that the defendant was unable to meet his obligations, and the defendant's financial failure soon became well known to the plaintiff through other members of his family."

The plaintiff, who was a physician, went to Europe shortly after the execution of the indenture of trust, and remained there until the end of the year 1893, with the exceptions of a short time in 1874 and of six months in 1889; since 1893 the plaintiff has remained in this country. The defendant is a lawyer and resided in Boston during all the time in question. On April 1, 1895, the plaintiff filed in the Suffolk Registry of Deeds a revocation of the trust, and, on the 13th of May following, brought this bill against the defendant for an accounting.

The master made the following findings: "On the evidence as a whole, I find that the defendant took and used the plaintiff's money allowing him interest thereon, and made himself a debtor for the sums so used; that he informed the plaintiff

Digitized by Google

of what he was doing; that the plaintiff acquiesced in the arrangement, and that the terms of the indenture were modified or suspended by mutual understanding so as to permit it, at least until the money should be invested in the plaintiff's behalf; and that the plaintiff waived all provisions of the indenture inconsistent with this method of using the money." "The fact that the defendant was charging a commission on income might indicate, if standing alone, that he was collecting the income from some person other than himself, and this charge is not altogether easy to explain in view of the actual situation and the position taken by the defendant in his accounts and correspondence. But, whatever may have been the defendant's explanation of this charge on income which he was paying out of his own pocket, the charging of the commission could not, in my judgment, have misled the plaintiff into the belief that this interest, periodically credited at the invariable rate of seven per cent, was anything else than what it purported to be, a credit allowed by the defendant on the daily balance standing to the plaintiff's credit."

The master has found that when the defendant was ruined financially at the end of the year 1877 and all remittances from him stopped and the defendant's financial ruin became known to the plaintiff, as it did shortly after it took place, there was no longer any trust in existence in fact, although the indenture of trust had not been technically revoked. When a trustee with the full knowledge of the *cestui que trust* has taken all the proceeds of the trust property and has become his debtor for it, the whole transaction has been reduced, in fact, to a debt due from the trustee to the *cestui que trust*. When this is followed by the financial ruin of the trustee, there is no room to hold that the trust relation also continues because by the understanding of the two, the debt was to be paid when a favorable investment should be found. In such a case there is no trust property except the debt due from the trustee, which cannot be collected, and there is no occasion to end the trust, for it has been already changed into a debt. There was no recognition by the defendant of any trust after 1877. The suit, having been brought eighteen years after the transaction had been reduced to a mere chose in action, is barred by the statute of limitations.

Digitized by Google

*Campbell* v. *Whorisky*, 170 Mass. 63, has been much relied on by the plaintiff; but in that case the money was not to become due until demanded by the plaintiff, and the plaintiff supposed that her money was safe, and her right to it was recognized by the defendant until he refused to pay her her money when she demanded it. This cannot be said in this case, after the defendant, having with the plaintiff's knowledge taken all the proceeds of the trust fund and become his debtor therefor, became financially ruined.

The plaintiff argues that the charge of a five per cent commission on income is inconsistent with the conclusion that the defendant became a debtor of the plaintiff for the amount of the proceeds of the trust property. There seems to have been much confusion in the minds of both parties throughout these transactions; but we agree with the master that this fact is not controlling, and in spite of it we affirm the finding made by the master on the whole evidence.

*Decree dismissing the bill affirmed.*

---

MARTIN L. D'OOGE, trustee, *vs.* ALFRED LEEDS & others.

Hampden. March 12, 1900. — September 21, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Distribution of Surplus to Shareholders of Joint Stock Association — Will — Tenant for Life and Remainderman — Capital and Income.*

The surplus of a joint stock association organized under the laws of the State of New York, which was held and used under the requirements of the original articles of the association as a fund "to protect the shareholders and provide for losses," and the income of which it had divided among its shareholders from time to time, together with the earnings of the original capital, was distributed by vote of the managers to the shareholders by issuing bonds equal in amount to the capital stock of the company. The bonds contained no binding contract by anybody to pay anything. They merely gave the holder a contingent right to be paid out of the securities which previously had been held by the company, and which were transferred to the trustee with a proviso that they should be held by the new trustee as they had been held by the trustees of the company,

Digitized by Google

for the security and indemnification of the shareholders against personal liability for the debts of the company; and payments were to be made to the bondholders only from such proceeds of the securities as should be applicable for the purpose, after provision was made for the payment of all other debts of the company. *Held*, that the bonds were like an issue of preferred stock, and that, as between tenant for life and remainderman, they were capital and not income.

PETITION to the Probate Court by the trustee under a will for instructions as to the disposition of certain bonds and a sum of money. A decree was entered, to the effect that they were income of the trust fund; and an appeal was taken. *Knowlton*, J., reserved the case for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in March, 1900, and afterwards was submitted on briefs to all the justices.

*W. W. McClench*, for Alfred Leeds, a remainderman.

*G. A. Bacon*, for William B. Sargent, the life tenant.

KNOWLTON, J. The petitioner is a trustee under the will of Elizabeth Lambert, by the residuary clause of which she directed him to hold three-sixths of the residuum as a trustee, and to pay over the income of it to certain persons for life, and on the death of the last survivor of them to pay over the principal to certain persons and corporations to be held by them absolutely. A part of the property which has come into his hands is twenty-two shares of the capital stock of the Adams Express Company. This company is not a corporation, but a joint-stock association organized under the laws of the State of New York and having a capital stock divided into transferable shares. It had accumulated from earnings a surplus amounting to more than twelve million dollars, which it had invested in securities and property, the income of which it had divided among its stockholders in cash dividends from time to time, together with the earnings of the original capital. On the ninth day of February, 1898, the board of managers of the company voted to distribute its surplus to the amount of $12,000,000 among its shareholders, by issuing bonds equal in amount to the capital stock of the company, in denominations of $1,000 and $500, so that each shareholder should receive in bonds an amount equal to his capital stock. Under this vote, the petitioner has received two bonds of $1,000 each, and $200 in money the proceeds of his fractional interest in another bond, and the question is whether they are to be

Digitized by Google

turned over to the life tenant as income or are to be held as a part of the principal.

Ordinarily when a testator leaves property to a trustee, the income of which is to be paid to one for life and the principal paid to another after the death of the life tenant, it is the duty of the trustee to take the whole property and use and invest it as a single fund, of which the income only is to be paid to the life tenant, and the principal is to be held for the remainderman. If the property, or a part of it, is of a kind which under the law is controlled and managed by another, so that the trustee can receive into his hands only what the managers turn over to the owners of the beneficial interest, questions of difficulty sometimes arise in determining whether the receipts are income or principal. There is much confusion in the decisions on these questions in the English courts. The judges apparently have desired to take the property as a whole and as the testator is supposed to have known it, and treat it as a single fund, that is, as capital, when the will takes effect upon it, and then determine whether that which afterwards comes into the hands of the trustee is income from it, or is a part of the principal fund. The questions have most often arisen in connection with property in corporations. In reference to such property, the rule in Massachusetts is now well established. Everything is made to turn upon the action of the corporation. "A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital." *Minot* v. *Paine*, 99 Mass. 101, 108. *Daland* v. *Williams*, 101 Mass. 571. *Leland* v. *Hayden*, 102 Mass. 542, 550. *Rand* v. *Hubbell*, 115 Mass. 461. *Gifford* v. *Thompson*, 115 Mass. 478. *Adams* v. *Adams*, 139 Mass. 449, 452. In considering the distribution to determine its character, substance and not form is regarded. The simple question in every case is whether the distribution made by the corporation is of money to be spent as income, or is of capital to be held as an investment in the corporation. While this arbitrary rule may sometimes defeat the intention of the testator, in most cases it accomplishes the result intended, and there were practical considerations as well as principles which required the adoption of it. The property of a corporation, in whatever way obtained, belongs, in the first instance, to the corporation and not to the stockholders. It

Digitized by Google

may be used and managed as the interests of the corporation require. Sometimes it is desirable to divide the greater part of the earnings as income as soon as they are received. Sometimes it is important to retain large accumulations of earnings as additions to the original property and to make them a part of the permanent capitalization. Often it is desirable to keep in the business a large surplus to provide for losses or other contingencies which cannot be foreseen. For these reasons, as well as because of ownership, it is well that corporations should be permitted to determine for themselves how much of their earnings they will divide as income and how much they will retain as capital.

Courts have often suggested the desirability of ascertaining whether the distribution in question is from a surplus accumulated prior to the creation of the trust, or from one accumulated during its continuance. Many decisions in England have been affected more or less by this consideration. See *Bouch* v. *Sproule*, 12 App. Cas. 385, and *Sproule* v. *Bouch*, 29 Ch. D. 635, and cases cited. But in Massachusetts, and we think now in England, it is held to be impracticable in most cases to conduct such an inquiry in the courts with justice to the parties. It would often be impossible to tell what part of an apparent surplus on hand at a particular time was needed for the protection of the capital, or to determine just when the surplus was earned. The conditions which create expenses often come into existence a long time before the expenditures are made, and the returns of one period are often the fruit of effort or outlay made long before. In cases of corporations, therefore, our court does not inquire further than to ascertain whether the distribution is of money to be used as income, or is of capital to be continued in the business. This, too, is the rule in the Supreme Court of the United States. *Gibbons* v. *Mahon*, 136 U. S. 549.

In the present case, although the Adams Express Company is not a corporation, it is like a corporation in the management of its property and business. The stockholders are all liable as partners for the debts of the company. But under the articles of association the business of the association is conducted and governed by a board of managers consisting of nine persons. The property and effects of the association are in the possession



Digitized by Google

and custody of the trustees, consisting of the president and two other managers who hold the legal title, and dividends are to be declared by the managers to such an extent as they may from time to time determine. It was also provided in these original articles that each share should be subject to the payment of assessments as might be necessary in cases of loss, and that "a fund should be created out of the surplus profits of the association to protect the shareholders and provide for losses." The proceedings of the company, which are before us, show that at the time of the distribution this surplus, to the amount of more than twelve million dollars, was being held and used under the requirements of the original articles of association as a fund "to protect the shareholders and provide for losses." In that way it was used in the business according to the original intention of the shareholders and according to their contract, as much as any part of the capital. It had been invested for the most part in long-time bonds and in good income-producing stocks and securities, a schedule of which is before us. The case finds that the income from these investments was divided among the shareholders from time to time, together with the other earnings of the capital. So this fund was performing a double function, as a part of the permanent property of the company which had been thus capitalized in accordance with the articles of association. The condition as to these earnings was like that referred to by Chief Justice Chapman in *Minot* v. *Paine*, 99 Mass. 101, 107, when he says: "It is obvious that, if the directors had made no stock dividend, but had invested the income in permanent improvements, making no increase of the number of shares, the improvements would have been capital, belonging to the legatees in remainder." It was like that referred to by Lord Herschell in *Bouch* v. *Sproule*, 12 App. Cas. 385, 393, only that the capitalization was express and more complete. He says, "I think the decision in *Brander* v. *Brander*, 4 Ves. 800, proceeded on the ground which Lord Justice Frye accurately states as the foundation of the judgment in *Irving* v. *Houstoun*, 4 Paton Sc. App. 521, viz., that the accumulated profits had become part of the floating capital of the concern. But they had become so, not by reason of any declaration of the company that they should be so, but only in

Digitized by Google

the sense that, having accumulated, they were, *de facto*, used as part of its capital. In this sense, however, all accumulated profits which are in use for the purposes of the business of any company, may equally be said to form part of its floating capital."

It is to be noticed here that we have no such question as often arises between partners as to what shall be called capital and what income, when by their contributions to the capital, or by the terms of the partnership articles, their proportional shares of the income are different from their shares in the capital. Such questions arise when a partnership business is closed and the partnership affairs are settled, or at any earlier time when there is a division of the profits. In reference to such a question the rule is that everything in addition to the capital contributed by the individual partners is income; but the question in reference to the rights of life tenants and remaindermen is, What part of the property is held in the business as a fund to be used for the benefit of the business, and what part is permanently separated from the business and turned over to the individual proprietors as income to be spent?

In this company each shareholder is entitled to the same share of the income as of the capital. Like the directors of corporations, the managers under these articles of association have the power to determine what dividends shall be declared and distributed as income, and what part of the earnings shall be retained in the business and used as capital. So far as concerns the question now before the court, we see no reason for treating this distribution differently from a distribution of a similar kind made by a corporation.

This property, having been in the business on February 9, 1898, to be kept and retained like the original capital for permanent use there, was owned by the trustees, and the beneficial interest of the shareholders in it was represented by their certificates of stock. When these bonds were issued, what occurred? First, there was a change of form in the ownership, so that each shareholder had, as evidence of his title, bonds for a part and his original certificates of stock for the rest. His actual title was neither less nor more than before. His ownership was divided so that either part could be trans-

Digitized by Google

ferred without the other, and different attributes were given to different parts of the property. The bonds contain no binding contract by anybody to pay anything. They merely give the holder a contingent right to be paid out of the securities which previously had been held by the company, and which, to the amount of twelve million dollars, were transferred to the trustee with a proviso that they should be held by the new trustee, as they had been held by the trustees of the company, for the security and indemnification of the shareholders against personal liability for the debts of the company. By the terms of the transfer payments can be made to the bondholders only from such proceeds of the securities as shall be applicable for the purpose, after provision is made for the payment of all other debts of the company. The bonds issued to the shareholders are like an issue of preferred stock. The interest is to be paid to the holders, if payment can be made without imperilling the interests of the shareholders who are to be protected from their liability for the debts of the company. On winding up the affairs of the company the principal is to be paid them in full in preference to the claims of common stockholders, if the proceeds of the securities are enough for the purpose. As compared with the common stock, these bonds give greater security; but the dividends can in no case exceed four per cent, while the dividends on the common stock are limited only by the amount of the earnings. If this company had been a corporation and had wished to make a dividend of preferred stock to its shareholders it would have done it in just this way. There has been no dividend of any money or property among the shareholders. There has been merely a change of the form of the ownership in the property, by dividing it into two classes and by making a different provision in regard to dividends for each class, and by giving one class a preference over the other in its right to the assets on final liquidation. Not a dollar's worth of the property of the company is taken out of the business or changed in its relation to the business. While the legal title is in a new trustee, the management of all these securities is retained by the managers of the company, subject to certain provisions for the protection of the bondholders.

Digitized by Google

That the principal represented by the so called bonds is to remain as an investment in the company and to be used as capital is too plain for discussion. The bonds give only a contingent, equitable interest in certain property of the company. By their terms they are to run for fifty years, which is as long a time as the company is to continue in existence, unless some new arrangement is made. The very nature of the bonds presupposes that as an investment they are to be as permanent as the capital stock of the company; for by their terms they cannot be paid until the debts of the company are all provided for, not only the debts existing at any particular time, but the debts that may be contracted so long as the company continues in existence.

That it was contemplated that the bonds and the original stock should continue contemporaneously as investments, and that the two kinds of holdings in the company should terminate at substantially the same time, is further shown by the facts that the bonds are made payable on March 1, 1948, and that the managers recommended an amendment of the articles of association, which we suppose has been adopted, so as to read, "The association shall continue until July 1, 1948, unless otherwise dissolved by law, or according to these articles."

It is plain that the action of the company was like making a dividend of preferred stock. It was a more formal capitalization of earnings which previously had been capitalized in substance and effect. Applying the rule by which the court is governed in such cases, it follows in the opinion of a majority of the court, that these bonds must be held by the trustee for the benefit of the remaindermen, as the property which they represent was held before the change.

It is apparent that these earnings had all, or nearly all, been accumulated before the will took effect, and had been treated as capital, and that the testatrix had been receiving income from them in her lifetime. She must have expected that her entire property in this company would be treated by her trustee as principal, which, after payment of the income, would be preserved for the remaindermen.

*Decree accordingly.*

Digitized by Google

SAMUEL L. GROSS & others *vs.* SADIE H. MILLIGAN.

Middlesex. March 22, 1900. — October 15, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Mortgage — Equity — Decree — Principal and Agent — Statute of Frauds — Consideration.*

In this case, which was a suit in equity to obtain the execution of a release of a portion of the land included in a mortgage, the evidence warranted the decree for the plaintiffs.

If a mortgagor of land, in order to free certain lots from the mortgage, having applied for a loan to be secured by a mortgage of the balance of the land, consents to the loan being carried through by an assignment to the lender of the original mortgage and by giving a second mortgage excluding the lots in question, upon the assurance of the lender's agent, who conducts the negotiations, that those lots will be released as soon as the second mortgage is executed, the lender cannot set up the statute of frauds in defence of a suit in equity to obtain the release; and the objection that there is no consideration for the agent's promise, but that the consideration is the money named in the mortgage, and that is expressed in writing and cannot be added to or contradicted, is untenable.

BILL IN EQUITY, filed July 29, 1898, in the Superior Court, by Samuel L. Gross, Alonzo Stouch, and Kurwin L. Eisenhart, doing business under the name of La Buta Cigar Company, Sylvester G. Bennett and Sarah A. Bennett, his wife, to obtain the execution of a release of certain lots of land in Everett from a mortgage. At the hearing a decree for the plaintiffs was entered; and the defendant appealed to this court. The facts appear in the opinion.

*G. C. Abbott*, for the defendant.

*G. E. Smith & W. F. Garcelon*, for the plaintiffs.

LORING, J. We are of opinion that the decree of the Superior Court should be affirmed. The plaintiff introduced evidence of the following facts: That in September, 1897, the plaintiff, Sylvester G. Bennett, in behalf of his wife, in whose name the land, hereinafter spoken of, stood, applied to one George C. Abbott for a loan of $3,000, to be secured by a first mortgage on certain land in the town of Everett; he told Abbott that there was at that time a mortgage on the land, held by the Malden Savings Bank; that this mortgage covered not only

Digitized by Google

the parcels of land which his wife wished to mortgage as security for the loan of $3,000, but also four other lots of land which had been mortgaged or conveyed to others after the mortgage was given to the Malden Savings Bank, and which were not to be included in the mortgage to secure the loan in question; three of them had been mortgaged to the La Buta Cigar Company, and the fourth had been sold and conveyed to one Blaisdell. The plaintiff testified that his purpose in getting the new loan was to get these four lots freed from the incumbrance of the Malden Savings Bank mortgage. The application was first made to Abbott in his office. Abbott then said that he knew a party who might lend the money, and that he would find out in a few minutes; he then went to the telephone and spoke with some one, came back and said "it was all right if the security was sufficient;" that the witness, Sylvester G. Bennett, and Abbott then made an appointment to meet on the land; they met there, and the witness pointed out the boundaries of the tract of land covered by the mortgage of the Malden Savings Bank, the boundaries of the Blaisdell lot, and of the three La Buta lots, which had been conveyed or mortgaged by the Bennetts after their mortgage to the Malden Savings Bank, and explained the whole situation to Abbott; he also pointed out a Peach lot, so called, which had been released from the Malden Savings Bank mortgage after the execution of that mortgage and was to be excepted out of the new mortgage. The witness soon after received from Abbott a mortgage deed to be executed by him and his wife, conditioned for the payment of $1,032.65; the description of the land covered by the mortgage excluded the three La Buta lots and the Peach lot, and excepted the Blaisdell lot, which was included in the general description of the land covered by the mortgage. On receiving this deed the witness called upon Abbott for an explanation; Abbott then told him that he thought the mortgagee would get a better title by taking an assignment of the Malden Savings Bank mortgage and lending on a new mortgage the balance of the $2,700 which the plaintiffs had agreed to take in place of the $3,000 originally applied for, after deducting the amount due on the Malden Savings Bank mortgage, and that he had had the Malden Savings Bank mortgage assigned to the defendant. The witness objected

Digitized by Google

to that arrangement on the ground that if the loan was carried through in that way he would not get the three La Buta lots and the Blaisdell lot freed from the Malden Savings Bank mortgage; thereupon Abbott said that the mortgagee would release these four lots when the mortgage to the defendant, the second mortgage, was executed. The witness then asked Abbott if he had the releases of the four lots ready; Abbott said that he would have them ready when the second mortgage was executed and the papers passed. When the time came to pass the papers Abbott said that he had forgotten to draw these releases, but that he would do so; the witness objected to passing the papers until the releases had been made and executed; Abbott then said that he would draw the releases and have them executed as soon as he could see the defendant; relying on that statement the witness and his wife delivered the mortgage for $1,032.65, and received the amount thereof, being the balance of the $2,700 after deducting the amount due on the Malden Savings Bank mortgage and the amount of Abbott's bill for looking up the title and drawing the papers. A few weeks afterwards, no releases having been executed by the defendant, Sylvester G. Bennett and the plaintiff Eisenhart, one of the partners in the La Buta Cigar Company, called upon Abbott, and Abbott then admitted that the original agreement, made when the mortgage to the defendant was taken, contemplated these three parcels of land covered by the mortgage to the La Buta Cigar Company being released, and that the only reason why they had not been released was that he, Abbott, had not been paid for drawing the papers.

All this evidence was denied by Abbott in his testimony. Without stating at length Abbott's version of the case, it is enough to say that we are of opinion that the judge who heard the suit was warranted in believing the plaintiff and not believing Abbott; and we see no reason for setting aside his finding on that point.

In addition to the objection that the judge should have made a general finding for the defendant on all the evidence, the defendant has made several other objections to the decree made by the Superior Court. First, that Abbott had no authority to make a promise in behalf of the mortgagee that these four lots should

Digitized by Google

be released. It appeared that all the negotiations were had and the transaction was carried through by Sylvester G. Bennett and Abbott, and that Sylvester Bennett's wife did not see Abbott or the defendant, and that the defendant, the mortgagee, did not see either Mr. or Mrs. Bennett in the matter; Abbott testified that he in fact never had any authority from the mortgagee to promise that the release should be executed. But the plaintiffs' evidence tended to show that Abbott in his interview with Sylvester Bennett and Eisenhart admitted that by the terms of the agreement under which this loan was made it was stipulated that these lots were to be released; the judge was warranted in finding on this admission and the other evidence that the loan which was accepted was a loan on the land exclusive of the three La Buta lots and the Blaisdell lot, and that when that loan was carried through by an assignment of the Malden Savings Bank mortgage the defendant became bound to release the four lots of land; in such a case there is no question of Abbott's authority to agree to release the four lots; she was bound to do so as the result of the way which was adopted of carrying through the loan which it was agreed should be made. In addition to this, the defendant was not present at the hearing; it appeared that she was a woman of forty-five or fifty years of age, living in Newton; that within two or three weeks she had been told that the case was assigned for hearing on the day on which it was heard; and that there was no physical reason why she should not be present.

The defendant's second objection is, that the promise relied on is a promise within the statute of frauds, and it appeared that it was given by word of mouth only. But the Bennetts, whose purpose in getting the loan of $2,700 was to free the four lots from the incumbrance of the Malden Savings Bank mortgage, gave their consent to that loan being carried through by an assignment to the defendant of that mortgage, which covered those four lots, and by giving a second mortgage on the land excluding the four lots in question, on Abbott's statement that the four parcels were to be released, and that it was by accident that the releases had not then been drawn and executed, and that if the papers were then passed they would be drawn and executed without delay; the Bennetts' consent to the loan, which was to

Digitized by Google

free the four lots from the lien of the Malden Savings Bank mortgage, being carried through by an assignment of that mortgage to the defendant and the giving of a second mortgage on these assurances, was a change of situation by the plaintiffs within the rule in *Glass* v. *Hulbert*, 102 Mass. 24; for that reason it is not now open to the defendant to set up that that promise was not in writing, and that by reason of the statute of frauds it cannot be enforced; the cases affirming *Glass* v. *Hulbert* are collected in *Low* v. *Low*, 173 Mass. 580.

The other objection is that there is no consideration for this promise; that the consideration was the money named in the mortgage, and that is expressed in writing and cannot be added to or contradicted. This is so plainly untenable that no discussion of it is necessary. *Decree affirmed.*

---

JOHN W. WEEKS & another *vs.* FRANK B. PARSONS.

Suffolk. January 19, 1900. — October 16, 1900.

Present: HOLMES, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Promissory Note — Contribution between Indorsers becoming Co-sureties — Assumpsit — Statute of Frauds — Joint Action — Liability of Director to account for Profit in Purchase and Sale of Assets of Corporation.*

If there is an understanding between the directors of a corporation that they shall indorse certain promissory notes for the benefit of the corporation, and it is also intended and understood that the indorsements are to be joint and not several, the indorsers are, as between themselves, co-sureties. It is not necessary that there shall be a contract in so many words to sign as co-sureties.

It may be shown by parol evidence that as between themselves the relation between successive indorsers of a promissory note is that of co-sureties.

Assumpsit will lie by one surety against another on the contract implied from their relation as co-sureties to recover from him his share of the amount paid in settlement of the common liability; and even if there is an express agreement between them to contribute, it does not follow that assumpsit will not lie.

The statute of frauds does not apply to an action by one indorser of a promissory note, after he has paid it, to recover contribution from his co-indorser, the indorsements being made with the understanding that they shall be joint and not several.

Two persons, each of whom is jointly liable with another for the amount of a promissory note, may join in one action, after payment of the note by them, to recover

Digitized by Google

from him his share of the sum so paid; and if one of the plaintiffs dies after action brought, the other may maintain the action for the benefit of himself and the estate of the deceased plaintiff.

If a director of a corporation, who, with other directors, indorses a promissory note made by the corporation with the understanding that the indorsements shall be joint and not several, buys a portion of the assets of the corporation sold by an assignee at public auction and afterwards sells them, it not appearing that the sale by the assignee was not conducted fairly and in good faith, such director is not required to account for the profit, if any, which he may have made by the purchase and sale, in an action by him, after he has paid the note, to recover contribution from a co-indorser.

CONTRACT, by John W. Weeks and John C. Holman. The declaration contained seven counts, each for money paid by the plaintiffs to the defendant's use in taking up, after maturity, seven promissory notes, upon which the plaintiffs, the defendant, and others were accommodation indorsers, and also an eighth count upon an account annexed, for the same causes of action set forth in the other counts. Answer: 1. A general denial. 2. The statute of frauds. Trial in the Superior Court, without a jury, before *Lilley*, J., who reported the case for the determination of this court, in substance as follows.

The plaintiff Holman died since the beginning of the action, and the case was prosecuted by the plaintiff Weeks in his own behalf and in behalf of the estate of Holman.

There was evidence that the Davidson Ventilating Fan Company was a corporation organized under the laws of the State of Maine in 1891, doing business in Boston, of which the plaintiff Weeks was the president. The defendant was the treasurer and general manager, and these two, together with Holman, Frank Q. Browne, and Henry C. Hall, were directors, and held such offices respectively from the organization of the corporation until January 7, 1895, when the defendant resigned the offices of treasurer, director, and general manager; and the others continued in office until the corporation ceased to do business in May, 1895.

In 1892 and 1893, the corporation being in need of funds with which to carry on its business, the plaintiff Weeks, at a meeting of the directors held for the purpose of considering what action should be taken to raise money to carry on the corporation's affairs, at which all were present, stated that he was ready to indorse the corporation's paper jointly with the other directors

Digitized by Google

for the purpose of raising the necessary funds; and thereafter a note or notes were drawn by the corporation, signed by the defendant in the corporate name, payable to the corporation, indorsed by the five directors and the corporation, and discounted. The proceeds of such notes were placed in the treasury and applied for the use and benefit of the corporation; such note or notes as they became due were renewed in like form and manner, and other notes were given for additional sums from time to time, and the seven notes referred to in the declaration were the last renewals of the notes heretofore mentioned, and all outstanding at the time the corporation was unable to meet its liabilities.

The defendant either prepared such notes and the renewals thereof from time to time, and offered them for signature to the various directors, or instructed his assistants in the corporation's office to prepare such notes and the renewals thereof, and to present them to the directors for signature, which was done; and the signatures of the directors upon the seven notes in question appear on no two notes in the same order of signing, and no direction was ever given by the defendant as treasurer to his assistants as to the order in which the directors should affix their signatures as accommodation indorsers, but his instructions to them were to get the signatures of the directors. The defendant testified that he never heard the plaintiff Weeks make the original proposition, or any other proposition, in relation to the indorsing of the notes, except on some occasions when he himself handed some of the notes to Weeks, indorsed by the other directors; that then Weeks stated to him that he, the defendant, should sign the notes, as the bank required that all the directors should indorse the notes before they could be discounted, and the defendant thereupon indorsed those notes.

The corporation made an assignment for the benefit of its creditors. The seven notes referred to in the declaration were not paid by the corporation at maturity, and were duly protested by the respective holders thereof, and due notice was given to all the indorsers thereon. The notes were paid shortly after maturity by check of Hornblower and Weeks, a copartnership of which the plaintiff Weeks was a member. The plaintiff Holman was then in the employ of Weeks, and the amounts as

Digitized by Google

paid were charged by the firm to Weeks and Holman in their respective accounts, or were put on a special account for which both the plaintiffs were responsible. Weeks testified as to this point: "I do not know whether or not Holman had provided the money to pay one half the amount of each note before such note was paid, but he provided it then or later to pay one half the notes." The corporation, through an assignee for the benefit of its creditors, paid the plaintiffs a small dividend, but the plaintiffs received no other payment from the corporation or on its account.

At a sale by the assignee at public auction of the assets of the corporation, the plaintiff Weeks bought, or caused to be bought, a portion thereof, and paid for the same with his own money, and afterwards sold the same for $2,500. He testified that he did not know the value of the assets bought by him, and could not describe them, and did not remember what he paid for them; and testified further as follows: "My agent, if you want to put it that way, bought the assets (referring to a portion thereof) at public sale, and they were afterwards sold, and the $2,500 I have received since was on account of the sale of those assets." This had nothing to do with the dividend paid by the assignee, save as the amount which Weeks paid for such portion constituted a part of the fund from which the dividend was paid, and such sum has not been accounted for nor applied on the notes referred to in this action. The directors, Brown and Hall, contributed to the plaintiffs their respective proportions, as claimed by the plaintiffs, of the money paid by them, after the payment of the notes by the latter, but the defendant has never paid any portion of the sum so paid by the plaintiffs.

The defendant objected to the admission of any evidence tending to show an agreement and understanding other than that expressed in the notes which were introduced in evidence; and requested the judge to rule that such testimony was not competent under the declaration, but the judge declined so to rule; and the defendant excepted.

The defendant requested the judge to rule that as the declaration alleged joint liability by indorsement, while the notes showed only successive and several indorsements, there was a fatal variance, and the plaintiff could not recover; that the

Digitized by Google

declaration and each count thereof being framed in *indebitatus assumpsit*, this action could not be maintained on evidence showing an express promise, agreement, or understanding between the directors as to their mutual liability, "because where there is a special contract still subsisting, upon which the action might be brought, *indebitatus assumpsit* will not lie, and the cause of action must be set forth in a special count"; and that payment by the plaintiffs, they being prior indorsers, and there being no evidence of any express request by the defendant, would raise no assumpsit as against the defendant so far as he might appear on any of the notes introduced in evidence as a subsequent indorser, and, therefore, on the pleadings and evidence, the plaintiffs could not recover. The judge declined so to rule; and the defendant excepted.

The defendant objected to the admission of the evidence offered to show by parol an agreement or understanding as to indorsing the notes, on the ground that there was an attempt to establish by oral testimony an express promise to answer for the debt, default, or miscarriage of the corporation without any note or memorandum thereof in writing; and asked the judge to rule that the statute of frauds would be a bar to maintaining this action upon parol evidence of such promise, understanding, or agreement. The judge admitted the evidence, declined to give the ruling requested, and ruled that the understanding as to joint liability among the indorsers was not such an agreement as would fall within the statute of frauds; and the defendant excepted.

The defendant also asked the judge to rule that the plaintiffs were not entitled on the pleadings and evidence to maintain this action jointly, and, at the close of the evidence, that the plaintiffs were not entitled to recover in this action; that, assuming the relation of the indorsers to be that of co-sureties, as claimed by the plaintiffs, any profit made out of the assets of the corporation by one must enure to the benefit of all, and a portion of the value of or profit on the assets bought by the plaintiff Weeks must be accounted for in this action for contribution; and that this action could not be maintained, because it did not appear from the evidence how much the plaintiffs have paid more than their proportion or share of the common

Digitized by Google

debt, assuming the obligation to be joint, nor that the plaintiffs have paid more than upon a fair accounting they can ever be called upon to pay. The judge declined so to rule; and the defendant excepted.

The defendant further requested the judge to make a special finding as to whether or not there was an express contract as to the indorsement of the notes, which the judge declined to do, stating that he found that there was an understanding among the directors by which they were to indorse jointly, and that in his view of the law applicable to the case it was not necessary to show an express agreement; and the defendant excepted.

Upon all the facts the judge found that there was an understanding between all the directors that they indorsed the notes for a common purpose for the benefit of the corporation, in which they were commonly interested, and that it was understood and intended by them that the indorsement was a joint and not a several indorsement; and found that the plaintiffs were entitled to recover from the defendant his proportion of the sum expended by them, with interest.

If the rulings were correct, judgment was to be entered for the plaintiffs on the finding; otherwise, the finding was to be set aside and the case to stand for trial.

*W. O. Kyle*, for the defendant.

*G. A. Blaney*, for the plaintiffs.

MORTON, J. We see no error in the rulings or refusals to rule. The court found that there was an understanding between the directors that they should indorse the notes for the benefit of the corporation, and that it was intended and understood that the indorsements were to be joint and not several. There was evidence warranting this finding, and it follows from it that the indorsers were as between themselves co-sureties. It was not necessary that there should be a contract in so many words to sign as co-sureties. It was sufficient if it appeared, taking all of the circumstances into account, that that was the nature of the liability which as between themselves the parties intended to assume and did assume. *Clapp* v. *Rice*, 13 Gray, 403. *Mansfield* v. *Edwards*, 136 Mass. 15. *Mulcare* v. *Welch*, 160 Mass. 58. *Hagerthy* v. *Phillips*, 83 Maine, 336. *Macdonald* v. *Whitfield*, 8 App. Cas. 733.

Digitized by Google

We interpret the refusal of the court to find whether there was an express contract as meaning that, as the court in substance ruled, it was not necessary to show an agreement in so many words. In view of the finding as to the intention and understanding of the parties, it is manifest that the defendant was not harmed by the refusal of the court to find that there was not an express agreement, using the word "express" in the sense which we have given to it above. It is too well settled to require any extended citation of authorities that it may be shown by parol evidence that as between themselves the relation between successive indorsers is that of co-sureties. *Clapp* v. *Rice* and *Mansfield* v. *Edwards*, *ubi supra*. It is also well settled that *indebitatus assumpsit* will lie by one surety against another on the contract implied from their relation as co-sureties to recover from him his share of the amount paid in settlement of the common liability. *Bachelder* v. *Fiske*, 17 Mass. 464. *Mansfield* v. *Edwards*, *ubi supra*. "The right of contribution does not arise out of any contract or agreement between co-sureties to indemnify each other, but on the principle of equity, which courts of law will enforce, that where two persons are subject to a common burden, it shall be borne equally between them. In such cases the law raises an implied promise from the mutual relation of the parties." *Warner* v. *Morrison*, 3 Allen, 566.

Even if there had been an express agreement to contribute, it would not have followed that *indebitatus assumpsit* would not lie, and therefore the ruling that was asked for to that effect was rightly refused. *Gibbs* v. *Bryant*, 1 Pick. 118. But it was not necessary to show an express agreement to contribute, and there being no finding that there was an express agreement, the question presented by the request became a purely academic one. The statute of frauds does not apply, because the parol agreement related to the obligations of the indorsers *inter sese*, and not to a promise to pay the debt of another; also, so far as there was any promise it was one implied by law, as already observed, from the mutual relation of the parties when it was established that they were co-sureties. We do not see, under the circumstances disclosed by the exceptions, any difficulty in the bringing of the action by the plaintiffs jointly, or its maintenance, since Holman's death for the benefit of himself and Holman's estate. That mat-

Digitized by Google

ter is disposed of by *Clapp* v. *Rice*, 15 Gray, 557, it seems to us. We discover nothing in the facts stated in the bill of exceptions in regard to the sale of the assets of the corporation and the purchase of a portion thereof by Weeks, and the subsequent sale by him of the portion so bought, which requires that he should account for any profit that he might have made. It does not even appear that he made any profit. But there is nothing tending to show fraud or collusion on the part of Weeks, or that the assets did not bring all that they were fairly worth, or that the sale was conducted otherwise than in entire good faith. Under such circumstances the fact that Weeks was a director of the corporation does not require, we think, that he should account for the profit, if any, which he may have made.

*Judgment for the plaintiffs on the findings.*

---

PRODUCE EXCHANGE TRUST COMPANY *vs.* GEORGE BIEBERBACH & others.

SAME *vs.* WORCESTER BREWING COMPANY.

SAME *vs.* GEORGE BIEBERBACH & others.

Worcester. November 22, 1899. — October 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Promissory Note — Evidence — Corporation — Fraud — Trial — Verdict — Exceptions.*

Evidence tending to show a want of consideration for a promissory note, unaccompanied by evidence that the plaintiff did not take the note for value, in good faith, before maturity, is no defence to an action on the note.

In actions tried together against the maker and the indorsers of promissory notes made by a corporation, a note book containing entries of the making of other notes similarly signed and of the notes in suit, and of the payment of the other notes but not of the notes in suit, (the book and paid notes having been turned over to a receiver of the corporation with its effects,) and the notes so paid are rightly admitted in evidence as competent against the corporation, no request having been made that the effect of the evidence should be limited to the corporation. A request that the notes be not admitted as standards of handwriting is too broad, and a request that the purpose for which they are received be restricted is too indefinite.



Digitized by Google

In actions tried together against the maker and the indorsers of several promissory notes, there being abundant evidence as against most of the defendants of the genuineness of the notes, the notes are rightly admitted in evidence.

A by-law of a corporation authorizing promissory notes to be signed in a certain manner is rightly excluded in an action upon a note made by the corporation, no evidence being offered tending to show actual knowledge of such by-law by the plaintiff, who relies wholly upon proof that the corporation has recognized and paid notes signed like that in suit.

In this case, which consisted of three actions tried together upon promissory notes contended to have been received by the plaintiff from the bank which discounted them before maturity, the bill of exceptions does not show that the conversations between a witness for the defendants and the cashier of the bank, stated therein as conversations tending to show a fraudulent issuance of the notes and knowledge of such fraud by the cashier, were excluded wrongly.

Entries in the books of a bank which has discounted certain promissory notes, and the testimony of the clerks who kept the books as to facts within their personal knowledge, showing that the discounts went to the credit of the maker of the notes or his agent, whose evidence is thus in part contradicted, are competent and rightly admitted in an action upon the notes.

That A. represented the bank which discounted certain promissory notes made by a brewing company in erecting the brewery, that the notes were first sent to him and by him delivered to the bank, that the proceeds of one of the notes were credited to his account as agent, that the bank allowed him to overdraw that account, and that the notes were replaced in his hands for a day for some undisclosed purpose after they had become the property of the bank, do not justify a finding, in actions against the maker and the indorsers of the notes, that there was any fraud upon any of the defendants, either in issuing the notes or in dealing with their proceeds; nor does the fact that the notes were handed back to A. by the cashier of the bank for a day long after the time when they had been discounted have any tendency to show that the latter was a discounting officer.

If a promissory note issued by the officers of a corporation is signed by them, and is also indorsed by them and by others, with the intention that it shall be the note of the corporation, but the name of the corporation is accidentally omitted from the face of the note, such omission may be supplied by the insertion of its name without affecting the validity of the note; and the facts that the note was in the note book of the corporation and that it was similar to many other paid notes of the corporation, with the single exception of the omitted name, are ample evidence that the omission of the name was an accident.

A promissory note made upon a blank form, signed by "A. secretary" and "B. president," payable "to the order of ourselves," and indorsed "W. Brewing Company, B. president, A. secretary," filled out and the name of the corporation indorsed in the handwriting of A., is the note of the corporation.

The rights of the maker or of a prior indorser of a promissory note are not affected by the forgery of the name of a subsequent indorser.

Evidence of the payment by a corporation of many similar promissory notes executed and issued by the same officers and entered upon the same note book with the notes in suit disposes of the contention that there was a failure to prove the authorized issue of the latter notes by the corporation or their execution by its officers thereto authorized.

A request for a ruling based upon a fact of which there is no evidence is rightly refused.

In an action on a promissory note made by a corporation, a request for a ruling

Digitized by Google

directed to the contention that the note was not issued in accordance with the by-laws of the corporation is refused properly, if the evidence justifies a finding that notes issued like that in suit were duly issued as the notes of the corporation.

In this case, which consisted of three actions against the maker and the indorsers of certain promissory notes, the proceedings of the judge in taking the verdicts and ordering them to be recorded were proper.

No exception lies to the refusal to give particular instructions to the jury upon retiring to amend their written verdict so as to conform to the finding which they have reported.

THREE ACTIONS OF CONTRACT upon promissory notes, tried together in the Superior Court, before *Hopkins*, J.

The jury returned a verdict for the plaintiff in each case; and the defendants alleged exceptions, which appear in the opinion.

The case was submitted on briefs to all the justices.

*J. R. Thayer & A. P. Rugg*, (*H. H. Thayer* with them,) for Bieberbach and other defendants.

*R. B. Dodge, Jr. & W. J. Taft*, for the defendant Gibbs.

*F. W. Blackmer & E. H. Vaughan*, for Herrick, the receiver.

*W. S. B. Hopkins & F. B. Smith*, (*F. R. Dresser* with them,) for the plaintiff.

BARKER, J. Of these three actions, that against the Worcester Brewing Company was to recover from it as the maker of three promissory notes, each for the sum of $5,000, upon four months time, two of which were dated March 1, 1898, and the third, March 14, 1898. The first suit was against George Bieberbach, Abraham G. Reimold, George M. Gibbs, and Paul Henry, as indorsers of the note dated March 14, 1898. The third suit was against George Bieberbach, Abraham G. Reimold, and George M. Gibbs, as indorsers of the two notes of March 1, 1898.

The actions were tried together, the receiver of the property of the Worcester Brewing Company participating in the defence.

In the first action a verdict was rendered for the defendant Paul Henry, and also a verdict for the plaintiff against the defendants George Bieberbach, Abraham G. Reimold, and George M. Gibbs, for the sum of $5,348.22, the amount due on the note of March 14, 1898.

In the second action a verdict was rendered against the Worcester Brewing Company for $16,059.17, the amount due on the three notes.

Digitized by Google

In the third action a verdict was rendered against George Bieberbach, Abraham G. Reimold, and George M. Gibbs, for $10,713.34, the amount due upon the two notes of March 1, 1898.

The bill of exceptions upon which the case comes here was filed and is prosecuted by all the defendants in the three actions, except Paul Henry.

1. The first and second exceptions stated on the bill were to evidence admitted in proof of signatures upon the notes in suit. These exceptions have not been argued by the defendants, and we treat them as waived.

2. The third, fourth, fifth, and sixth exceptions were to the exclusion of the testimony of the receiver that none of the books of the company in his hands showed any entry or account of any money or benefit received from any of the notes in suit, the questions asked of the receiver and excluded being as to the cash book and other books of the company which had been placed in his hands by the officers of the company upon his appointment. The receiver was called as a witness by the plaintiff. He had before him in court the books to which the questions referred, and the questions excluded were asked him upon cross-examination by the defendants.

This evidence tended to show nothing more than a want of consideration, and this, unaccompanied by evidence that the plaintiff did not take the notes for value, in good faith, before maturity, is no defence. *Holden* v. *Phœnix Rattan Co.* 168 Mass. 570. There was no offer to show that the plaintiff did not take the notes in good faith for value, without notice and before maturity. As the cases stood, proof of want of consideration would have been no defence, and the defendants were not harmed by the exclusion of evidence tending to make such proof, even if the evidence excluded was relevant to an issue raised by the allegations of the answers. Under the circumstances the issue was immaterial and the evidence could be excluded properly.

3. Among the effects of the company turned over to the receiver by the officers were forty-nine paid notes made and paid by it, and a note book upon which those notes and the notes in suit were entered. The note book and notes were

Digitized by Google

admitted in evidence, and the seventh, eighth, and ninth exceptions relate to their admission. The note book contained entries of the making of each of the forty-nine notes and of the three notes in suit. It also contained entries of the payment of the forty-nine notes and no entry of the payment of the three. Many of the forty-nine notes were signed by the president and secretary in a way similar to that in which the notes in suit were signed, thus tending to show that it was within the duty of those officers to sign notes for the corporation. In some instances the signature of the company was made by the use of a rubber stamp, in others it was typewritten, and in others it was in the handwriting of the secretary, and in these respects the notes admitted were similar to those in suit. All this evidence was admitted rightly because it was competent as against the defendant company.

While the defendants when objecting to the admission of the evidence asked that the forty-nine notes should not be admitted as a standard of handwriting, and that the purpose for which they were to be received should be restricted, no request was made that either the book or the notes should be admitted only as against the defendant company. As against it the book and notes were its admissions and competent for all purposes. The exceptions to the admission of this evidence were, therefore, not well taken. No request was made that its effect should be limited to the defendant company. The request that the notes be not admitted as standards of handwriting was too broad, as they were competent for all purposes as against one defendant, and the general request that the purpose for which they were received be restricted, was too indefinite. See *Earle* v. *Earle*, 11 Allen, 1; *Howe* v. *Ray*, 113 Mass. 88; *Packer* v. *Lockman*, 115 Mass. 72; *Potter* v. *Baldwin*, 133 Mass. 427.

4. The tenth exception was to the admission in evidence of the three notes in suit. This exception has not been argued. There was abundant evidence as against most of the defendants of the genuineness of the notes and they were admitted rightly.

5. The eleventh exception was to the exclusion of evidence of the by-laws of the company, requiring "checks or other instruments for the payment of money" to be signed by the president and countersigned by the treasurer. No evidence was offered

Digitized by Google

tending to show that the plaintiff had actual knowledge of the by-laws. As the maker of the note was a corporation, its by-laws would have been competent in favor of the plaintiff to show that the notes were signed by persons having due authority from the corporation. But the plaintiff had not introduced them for that or for any purpose, and relied wholly upon the proof that the corporation had recognized and paid such notes made and signed like those in suit. While the by-laws gave authority to certain officers, the corporation could also confer the power to issue its notes in other ways. As the plaintiff relied wholly upon the fact that the corporation had been accustomed to recognize and pay notes made like those in suit, it was immaterial that the by-laws provided that notes should be made in some other manner. The defendants were not harmed by the exclusion of this evidence. The existence of such a by-law could not affect the rights of the plaintiff as the holder of a note signed by the officers, within the apparent scope of the power which the corporation held them out as having, by paying notes signed like those in suit.

6. In the course of the trial it was contended by the plaintiff that it had taken the notes in suit from the Standard National Bank of New York, and that that bank had discounted them before maturity. The defendants called as a witness one Shalek, who testified that he received the notes in suit by mail in New York, the two of March 1, 1898, on March 11, 1898, and that on the last mentioned day he took them to the Standard National Bank and gave them to one Burrows, its cashier, who was then also the treasurer of the brewing company; and that at a later date the witness received the note of March 14, 1898, with another of the same date, and mailed the same to Burrows at the bank. The witness also testified that he represented the bank in erecting the brewery. The defendant then offered in evidence conversations between the witness Shalek and Burrows, and the twelfth exception is to the exclusion of such conversations.

While the bill of exceptions states that the conversations so offered were conversations tending to show a fraudulent issuance of the notes, and also to show that Burrows knew of such fraud on March 11, 1898, the statements of the bill do not go far

Digitized by Google

enough to show that the conversations were excluded wrongly. For all that appears they may have been long after the notes were negotiated, and mere talk between persons whose declarations when made could not bind any party to these actions. While declarations accompanying a transfer of the notes from hand to hand, and perhaps other declarations contemporaneous with the acts of those persons who were concerned in the making of the notes and in putting them into circulation, might be admissible to show that they were put into circulation fraudulently, nothing is stated from which it fairly can be inferred that the conversations between Shalek and Burrows were of this nature, or that they took place at such a time and under such circumstances as to be admissible. Neither Shalek nor Burrows had any connection with the plaintiff, and it cannot be presumed that conversations between the two were so connected with the putting of the notes into circulation as to be admissible against the plaintiff.

After the offer to put in the conversations between Shalek and Burrows was excluded, Shalek further testified that ten or twelve days after March 11, 1898, he saw the notes on Burrows's desk at the bank; that he saw them again at the bank between April 15 and April 18, when they were handed to him by Burrows; that the witness kept the notes for twenty-four hours, and then handed them back to Burrows at the bank, and that at that time the words "Worcester Brewing Company," typewritten or stamped, were not on the face of the notes of March 1, 1898, and that those words on the face of these notes resembled in appearance the type and print of the bank; also that he never received any benefit from the notes and knew nothing further about them.

7. The thirteenth, fourteenth, and fifteenth exceptions are disposed of by what has been said. After Shalek's testimony the defendants called the president, two directors, and the receiver of the brewing company, and asked each of them whether the company had received any money or benefit from either of the notes in suit, offering to show that none of the defendants received any benefit from the notes. The defendants again offered to show by the receiver, from his examination of the company's books, that those books did not show any proceeds, benefit,

Digitized by Google

discount, or moneys received from either of the notes, or any advantage to the company, and also offered in evidence the books themselves for the same purpose.

There is no ground for sustaining the exceptions to the exclusion of this evidence when so offered, substantially for the second time. The bill of exceptions discloses no testimony tending to show either a fraudulent issue of the notes, or that they were taken by the plaintiff after maturity, or that the plaintiff was not a holder in good faith and for value. The evidence offered tended to prove nothing more than want of consideration, and, as before stated, under the circumstances this was not a defence.

8. The sixteenth exception was to the exclusion of another by-law of the company relative to the powers of its treasurer, offered by the defendants for the purpose of showing that the notes in suit were not prepared, executed, and issued in accordance with the by-laws. As has been said, the plaintiff relying wholly upon the course of business of the company in issuing, taking the proceeds of, and paying other notes similar to those in suit, proof that the by-laws prescribed other methods of making and issuing notes was immaterial, and its exclusion did the defendants no harm.

9. The seventeenth exception is to the admission of the entries in the discount book of the Standard National Bank showing that the notes of March 1, 1898, were discounted by the bank, one on March 16, 1898, and the other on March 22, 1898, and that the note of March 14, 1898, was so discounted on March 21, 1898; and that two of these discounts were to the credit of the brewing company and the other to the credit of Shalek as agent. Strictly speaking, the exception to the admission of these book entries, which is the only exception stated in the bill in connection with the testimony of the witnesses as a part of whose examination the entries were produced and admitted, has not been argued by the defendants upon their brief. There was no exception to the testimony of the bookkeeper, but merely to the admission of the entries from books. There is no argument in the brief as to the entries, but merely as to the testimony of the bookkeeper.

We are of opinion that the testimony and the entries were admitted rightly. If competent, this evidence tended to show

Digitized by Google

that the notes before maturity were the property of a bank whose business it was to deal with such securities, and in which, as the evidence introduced by the defendants had shown, the funds of the brewing company were to be kept on deposit in equal amounts with its deposits in its Worcester bank. This evidence tended also to contradict the testimony of the defendants' witness Shalek in several particulars.

So far as the oral testimony of the witness Spencer, who kept the discount book and ledger, is concerned, he testified to nothing which was not within his own knowledge. He testified that he had been in the employ of the bank and had kept its discount book and ledger, which books were made up from original vouchers presented to him. That the discount numbers in the books corresponded with the numbers which he had placed on the backs of the notes when they were entered on the discount book of the bank, and that he knew nothing further concerning the transactions.

This testimony was not, as the defendants argue, purely as to bookkeeping, and exactly contrary to the contention of the defendants' brief it did purport to be of knowledge which the witness had as to the bank's possession of or title to the notes. It was not testimony made by the bank, in its own interest or otherwise. It was testimony of acts done by the bank in the regular course of business, and of such a nature as to make evidence of them competent for or against itself or any person to whose rights they were relevant.

The notes themselves were in the hands of the witness. When he had handled them in the bank and entered them on its books they were not only original vouchers, but were articles of merchandise in which it was the business of the bank to deal. It is matter of common knowledge that banks may acquire the ownership of such property by way of discount, and that they identify property so acquired by marking the separate pieces of it with different numbers, and that they enter in books descriptions of the pieces of property so acquired and held. Every such act done in a bank, by its servants or employees, with reference to a promissory note is an act of ownership, competent to be given in evidence upon the question of title, if title at that time is subsequently in dispute. The testimony of Spencer was

Digitized by Google

merely in effect this: "I was an employee of the bank. It was my duty to handle its notes which it claimed to have acquired by way of discount, to mark them with numbers, and to enter them in a book kept for that purpose. In pursuance of this course of my employment I received these notes in the bank as discounted notes, I placed upon them as such notes these numbers which you now find on them, and I entered them as such notes on the books of the bank which I have here."

The question being one of the ownership of a certain piece of property at a given time, whether the property is a promissory note or a bale of merchandise, possession and acts of dominion are competent evidence of ownership, and may be testified to by any one who has personal knowledge. The taking into his hand a promissory note in a bank by a clerk for the purpose of marking it as the property of the bank, and the entering of it in a book purporting to be a list of property of the bank acquired in a certain way, are in and of themselves acts of ownership competent to prove title in the bank at the time when the acts were performed, and it is no objection to their competency that the employee of the bank who performed those acts of ownership does not himself know the whole previous history of the dealing of the bank with the notes. If there is anything in that dealing, or in the subsequent action of the bank, to give the lie to these acts of ownership, it can also be put in evidence, but the acts themselves are competent. They stand in the same category, as acts of ownership, with the handling by a shopkeeper and the marking as his own, and the entry in his inventory, of bales of merchandise actually present in his store and in his own control. So too, we think, the entries themselves were admitted rightly. They were competent to prove ownership in the bank whether they were competent to prove the precedent fact of discount or not, and so were admissible, and there was no request to limit their effect. Again, they were competent, in connection with other evidence, to show that proceeds of these notes were in fact placed to the credit of the brewing company and of Shalek, who, as other evidence tended to show, was as its agent erecting its brewery. Whether the bank discounted the notes, or received and disposed of them as a broker or agent, or had them in its possession as an agent for collection,

Digitized by Google

it had power to credit their proceeds to the brewing company or to Shalek, and such credits upon the books of the bank were a detriment to itself and an advantage to the brewing company, if they came so far as to be so entered in the depositor's ledger, as the evidence as a whole tended to show was a fact. All the entries were either acts of ownership on the part of the bank, or steps in the process of giving to the brewing company or to Shalek a pecuniary credit by reason of that asserted ownership, and, so considered, the matters shown by the entry were all within the personal knowledge of the witness who made it.

This being so we need not inquire whether the books of a bank are not competent evidence generally, as was intimated in *Union Bank* v. *Knapp*, 3 Pick. 96. We are aware of no case in which it has been attempted to apply to the books of a bank the rules governing the admissibility in evidence of entries in shop books. See *Kennedy* v. *Doyle*, 10 Allen, 161; *Donovan* v. *Boston & Maine Railroad*, 158 Mass. 450, and cases cited.

10. The eighteenth and nineteenth exceptions are to the admission of the testimony of one Van Blackum, who kept the bank's depositors' ledger, and of the entries made by him in that ledger in the particular accounts of the brewing company and of Shalek as affected by the discounts of the notes in suit. The evidence tended to show that the proceeds of two of the notes were credited by the bank to the brewing company and of the other note to Shalek as agent. A credit to a customer in a banker's books itself transfers the property in the credit to the customer. So far as that the brewing company and Shalek received the benefit of the credits, Van Blackum was testifying to acts, and from his personal knowledge. So far as he testified to debits, he had before him the original checks or drafts which he charged as debits, and so acted from personal knowledge. So far as his entries followed those made by Spencer, the discount clerk and previous witness, both the entries which he followed and the oath of the clerk who made them were before the jury. As has been seen, those entries were competent to prove ownership on the part of the bank, and with them and the oath of the clerk who made them, and the testimony of Blackum as to what he knew of his own knowledge, the entries made by the latter were competent to prove that the brewing company and

Digitized by Google

Shalek as agent did receive benefit from the notes in suit, to the extent of the credits given them on the books of the bank by reason of the dealings of the bank with the notes.

11. The first of the ten exceptions to the charge was to a ruling that "if there were any evidence leading the jury to believe that Burrows, treasurer of the Worcester Brewing Company, was guilty of any fraudulent practices upon the Worcester Brewing Company or any other party in this case, the fact that he was also cashier of the Standard National Bank would not impute to the Standard National Bank any knowledge of such practices by which the bank would be bound." The true rule is that knowledge by or notice to an agent, while acting for his principal, of facts affecting the transaction, is constructive notice to his principal; but if while acting for his principal the agent is himself engaged in committing a fraud upon the principal, his knowledge is not constructive notice to the principal. *Indian Head National Bank* v. *Clark*, 166 Mass. 27. Assuming that the instruction quoted cannot be given a meaning consistent with the rule, it could work no prejudice to the defendants, because, as was correctly stated in a later part of the charge, there was no evidence of fraud in the case.

The witness Shalek testified that he represented the Standard National Bank in erecting the brewery of the brewing company. Brown, the president of the bank, testified, on the contrary, that Shalek was not employed by the bank as agent in any capacity, so far as he knew. But assuming that Shalek did represent the bank in erecting the brewery, and that the notes in suit were first sent to him and by him delivered to the bank, and that the proceeds of one of the notes were credited to his account as agent, that the bank allowed him to overdraw that account, and that the notes were replaced in his hands for a day, for some undisclosed purpose, after they had become the property of the bank, which is all of the admitted evidence upon which the defendants can found any contention of fraud, the whole is insufficient to justify a finding that there was any fraud upon any of the defendants, either in issuing the notes or in dealing with their proceeds. All the facts testified to were consistent with entire good faith.

12. The same considerations are applicable to and dispose of

Digitized by Google

the next exception to the charge, which was to the ruling that "knowledge of an agent of his own misconduct or fraud on other parties cannot be imputed as notice to his principal."

13. The third and fourth exceptions to the charge were to rulings that there was no evidence that Burrows was the discounting officer, or one of the discounting officers, of the bank, or as to who were its officials authorized to discount commercial paper or charged with that duty. The only evidence which the defendants now contend supports their exceptions to these rulings is Shalek's testimony that the notes were handed back to him by Burrows for a day, long after the time when, upon Spencer's testimony, they had been discounted. This evidence had no tendency to show that Burrows was a discounting officer, and these exceptions to the charge must therefore be overruled.

14. The fifth and sixth exceptions to the charge relate to the question of the effect of the omission of the words "Worcester Brewing Company" from the face of the notes of March 1, 1898, when originally indorsed and issued, and of the subsequent insertion of those words as they now appear upon the notes. The instructions excepted to were, in substance, that the notes would be binding upon the brewing company and the indorsers, even though its name was not upon the face of the notes, and that the subsequent insertion of the name by the treasurer would not be an alteration affecting the validity of the notes.

If the name was accidentally omitted, and if it was the intention of the officers who signed the notes, and of the officials and individuals who indorsed them, that the notes should be the notes of the corporation, the correction of the mistake by the insertion of the name was proper. See *Hunt* v. *Adams*, 6 Mass. 519; *Ames* v. *Colburn*, 11 Gray, 390. The facts that the notes were entered in the note book of the company, and their similarity with its forty-nine paid notes in evidence, with the single exception of the omitted name, were ample evidence that the omission of the name was an accident. The tenth instruction requested by the plaintiff and given by the court is perhaps more doubtful, but we are of opinion that a note made upon a blank form, signed by George M. Gibbs, secretary, and George Bieberbach, president, payable "to the order of our-

Digitized by Google

selves," and indorsed "Worcester Brewing Company, George Bieberbach, President, George M. Gibbs, Secretary," filled out and the name of the company indorsed in the handwriting of Gibbs, is the note of the company, within the doctrine of *Carpenter* v. *Farnsworth*, 106 Mass. 561.

15. The seventh exception to the charge was to the ruling that the question as to the liability of Paul Henry as an indorser on the note of March 14, 1898, did not affect the question of the liability of other defendants in the suits upon that note. The indorsement purporting to be that of Paul Henry follows those of all of the other defendants. The jury found that his signature was not genuine, and the defendants contend that the addition of a false or forged indorsement was a material alteration of the note which made it invalid as to the defendants. But the rights of the maker or of a prior indorser are not affected by the forgery of the name of a subsequent indorser. *Mersman* v. *Werges*, 112 U. S. 139. See *Stone* v. *White*, 8 Gray, 589. The ruling was correct.

16. The three remaining exceptions to the charge were to rulings upon the question of fraud. None of them were prejudicial to the defendants, for the reason already given, that there was no evidence of fraud in the case, and these exceptions may be overruled without further discussion.

17. The first and second of the defendants' eleven prayers for rulings of law to be given to the jury were that there was no evidence warranting a verdict for the plaintiff against any of the defendants, and none warranting a verdict against the brewing company. The defendants now contend that these prayers should have been granted, because the signature of Paul Henry on the note of March 14 was a forgery; because the name of the brewing company was added to the face of the other two notes; and because there was a failure to prove the authorized issue of the notes by the company or their execution by its officers thereto authorized. The first two of these contentions have been already disposed of adversely to the defendants. The evidence of the payment by the company of many similar notes executed and issued by the same officers and entered upon the same note book with the notes in suit disposes of the last contention.

Digitized by Google

18. The third and fourth of the defendants' prayers related to the effect upon the plaintiff's rights of the obtaining of the notes by fraud on the part of the bank, and to the putting them into circulation fraudulently. The exceptions to the refusal to give these prayers must be overruled, because there was no evidence of fraud.

19. The fifth, sixth, seventh, and ninth prayers of the defendants deal with the addition of the words "Worcester Brewing Company" upon the face of the notes of March 1, 1898, and were to the effect that if those words were added by the bank, or without the knowledge or ratification of the defendants, the plaintiff could not recover upon the notes. These prayers were refused rightly, for the reasons already stated, that if the words were omitted by mistake, all parties intending that the notes were the notes of the company, any holder of the notes had the right to supply the defect by inserting the words inadvertently omitted, and also that in law the notes were the notes of the company.

20. The eighth of the defendants' prayers was to the effect that if Brown, the plaintiff's treasurer, was a director or financial officer of the plaintiff, of the bank, and of the brewing company, and was active in the management of all of them, they might find that the plaintiff was affected by knowledge of all infirmities of each of the notes. This prayer was properly refused because there was no evidence of an infirmity knowledge of which would affect the plaintiff's right to recover.

21. The exception to the refusal to grant the tenth prayer, that there was no sufficient evidence to warrant a finding that the plaintiff was a *bona fide* holder, and as such took the notes in good faith for value before maturity, is not argued upon the defendants' brief, and we treat the exception as waived.

22. The eleventh and last prayer refused under the defendants' exception was directed to the contention that the notes were not issued in accordance with the by-laws of the brewing company. It was refused properly, because the evidence justified a finding that notes issued like those in suit were duly issued as the notes of the company.

23. The remaining exceptions relate to the taking and recording of the verdicts. The fact that the jury were at the

Digitized by Google

same time charged with three suits, in one of which the plaintiff sued the maker of three notes, in another the indorsers of two of the same notes, and in the third the indorsers of the other note, with the variety of issues raised by the pleadings, made the task of the jury more than usually complicated.

After the usual hour for the adjournment of the court for the day, and in the absence of counsel, the jury returned into court with a verdict for the plaintiff in each action.

In the action against the indorsers of the note of March 14, 1898, the verdict, as presented by the foreman, stated that the jury found for the plaintiff, and assessed damages in the sum of $5,348.22. Following these statements was the signature of the foreman. Upon the same blank, beneath the signature of the foreman, were written the words "Jury find the name of Paul Henry on note not genuine," and these words were followed by a second signature of the foreman.

In the suit upon the three notes, in which the brewing company was the only defendant, the verdict stated that the jury found for the plaintiff, and assessed damages in the sum of $5,359.60.

In the suit against the indorsers of the two notes of March 1, 1898, the verdict stated that the jury found for the plaintiff, and assessed damages in the sum of $5,359.60. Upon the presentation of these three documents the court ordered a verdict to be entered and recorded in favor of the defendant Paul Henry, in the action in which he was a co-defendant, which was the suit against the indorsers of the note of March 14, 1898. The court did not permit the other verdicts to be recorded, but directed that all the papers handed in by the jury, including the three verdicts described, be kept by the clerk, and then dismissed the jury with instructions to assemble as soon as convenient after ten o'clock the next morning, when counsel would be present. The jury reassembled at the time indicated, and counsel were then present. The court proceeded to state for the information of counsel that on the preceding day, after the close of the regular work of the court, the jury had asked from what time interest was to be computed on the notes, and had been instructed that interest should be computed from the dates of the notes, after which the jury retired, coming

Digitized by Google

again into court after a lapse of some time and reporting that they had agreed upon their verdicts. The court further stated what had occurred the evening before, when a verdict was entered and recorded in the first suit in favor of Paul Henry, one of the defendants, and that the verdicts presented by the jury had not been recorded, and repeated in presence of the jury and of counsel the purport of those verdicts, beginning with the first of the three cases. In that case the court stated that the suit was upon one note only, and that the finding of the jury went to the whole issue; and the court thereupon ordered the verdict in that case to be recorded.

With reference to the second case, the action against the brewing company as maker of the three notes, the court said that as the finding was for five thousand and odd dollars only, while the suit was upon three five thousand dollar notes, the finding apparently did not go to the whole issue. The court then addressed the jury, saying to them that upon the assumption that their purpose was to find for the plaintiff in that case, they had found only upon one of the counts; whereas, if they intended to find upon the whole issue, their duty would have been to find upon the three counts, and the verdict would not be five thousand and odd dollars, but thrice that, that is, upon the three notes set out in the declaration; and that assuming that it was the jury's intention to find upon the whole issue, it was necessary to reform the verdict so as to cover all the counts; that in the third case the declaration covered two notes of $5,000 each, so that in that case also, assuming that their finding for the plaintiff was intended to cover the whole issue, it was necessary to reform that verdict so that it would correspond with the entire issue. The court then proceeded to explain correctly to the jury how, owing to the nature of the actions, the plaintiff might have verdicts amounting in the aggregate to a sum greater than that due on all the notes. The court then, after telling the jury that the changes suggested were only necessary if he was right in his assumption that they intended to pass upon the whole issue, said that upon that assumption he had caused the clerk to prepare verdicts in accordance with it, and directed the jury to retire with the papers in the cases and with the reformed verdicts, and that if it was their intention to find for the plaintiff upon the whole



Digitized by Google

issue they might sign the reformed verdicts, and return them as their verdicts and they would be recorded.

The forty-first exception of the defendants was taken to all these proceedings had after the request of the jury as to the time from which interest should be computed, and was taken before the jury went out with the reformed verdicts. After taking this exception the defendants asked the court to instruct the jury in detail as to their right to find for the plaintiff upon one or more counts, and to find also for the defendant or defendants upon one or more counts. The next exception was to the refusal to give this ruling. After retiring to their own room, the jury returned a verdict for the plaintiff in the second action, that against the brewing company upon the three notes, assessing damages in that action in the sum of $16,059.17; and for the plaintiff in the third action, that against the indorsers of the two notes of March 1, 1898, assessing damages in the sum of $10,713.34. The final exception of the defendant was taken to the accepting and recording of these verdicts.

There was no impropriety in the course taken by the court with reference to the verdicts. The circumstances of the trial justified the court in assuming that the jury had in fact found in favor of the plaintiff upon all the notes, and that the verdicts presented by them when they first reported their agreement were intended by them to give effect to a finding for the plaintiff upon all the notes. By the action of the jury in returning the amended verdicts this assumption has become a certainty. In consequence of the mistake of the jury as to the effective way of expressing its real finding, it was regular and proper for the court, as it did, to call their attention to the fact that the original verdicts in the two cases did not give due effect to a finding for the plaintiff upon all the notes, and to give the jury an opportunity to correct their mistakes, if they had in fact found that the plaintiff was entitled to recover upon all the notes. It is regular and proper to see that such mistakes are corrected in civil cases, even though the jury has separated before such action. See *Pritchard* v. *Hennessey*, 1 Gray, 294; *Winslow* v. *Draper*, 8 Pick. 170; *Chapman* v. *Coffin*, 14 Gray, 454; *Vennard* v. *McConnell*, 11 Allen, 555; *Mason* v. *Massa*, 122 Mass. 477; *Brown* v. *Dean*, 123 Mass. 254; *Kenney* v. *Habich*, 137 Mass. 421; *Spencer* v.

Digitized by Google

*Williams*, 160 Mass. 17; *International Trust Co.* v. *Wilson*, 161 Mass. 80, 88; *Twomey* v. *Linnehan*, 161 Mass. 91, 95.

While the presiding judge called the attention of the jury to what he properly might assume was a mistake in the form of two of the verdicts, he gave to the jury full liberty of action, and ample opportunity to say that the assumption was incorrect, if it did not agree with the fact as to their finding. The request to give particular instructions as the jury were about to retire finally was refused properly. They had decided the cases and reported their decision to the court on the preceding day, and the whole business at the time was to make the written verdict correspond with the decision and finding arrived at before the jury had separated after being charged with the cases.

*Exceptions overruled.*

---

FRANCIS ROCHE *vs.* NELLIE A. SMITH.

Suffolk. November 22, 1899. — October 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, & LORING, JJ.

*Agreement to exchange Land — Defective Title — Commission earned by Broker acting in Good Faith.*

If a broker is employed to find a person to convey land to be paid for by a conveyance of other land, that is to say, to effect an exchange, and the principal makes a valid agreement with the customer produced by the broker, the broker has earned his commission, even if it turns out that the customer cannot make a good title and the land is not conveyed, provided the broker acted in good faith in the matter.

LORING, J. This case was submitted to the Superior Court on an agreed statement of facts; judgment was entered in that court for the defendant, and from that judgment an appeal was taken to this court.

It appears that the defendant, being the owner of certain land in Boston, "employed the plaintiff to exchange said property for any other suitable property." The plaintiff brought the matter to the attention of Michael F. Armstrong, who offered to exchange a specified piece of land owned by him

Digitized by Google

for the land of the defendant; Armstrong's land was accepted by the defendant as "suitable"; and through the efforts of the plaintiff a written agreement was made between the defendant and Armstrong, by which the defendant was to convey her land to him and he was to convey his land to her; it was stipulated that each lot of land was "to be conveyed within twenty days from this date by a good and sufficient warranty deed . . . conveying a good and clear title to the same free from all incumbrances except [in the case of Armstrong's land] taxes for 1897 and a mortgage for thirteen thousand dollars." On examining Armstrong's title the defendant discovered that, acting under St. 1891, c. 323, St. 1892, c. 418, and St. 1895, c. 449, the Board of Street Commissioners of the city of Boston had filed plans in the office of the city engineer of the city of Boston by which certain streets or ways were located over the land to be conveyed to her by Armstrong, in consequence of which he "was unable to convey his said property free from the operation and effect of any of the said doings of the Board of Street Commissioners, and by reason thereof the defendant refused to carry out said agreements." Thereupon the plaintiff brought this suit for his commission.

It is expressly stated that "the plaintiff had no knowledge of the . . . facts relative to the acts of the Board of Street Commissioners of the city of Boston" which are stated above; and that he "acted in good faith in all said negotiations."

It was held in *Knapp* v. *Wallace*, 41 N. Y. 477, where the broker was employed to find a person to convey land to be paid for in money, and in *Kalley* v. *Baker*, 132 N. Y. 1, where the broker was employed to find a person to convey land to be paid for by a conveyance of other land, that is to say, to effect an exchange, that, where the principal makes a valid agreement with the customer produced by the broker, the broker has earned his commission, even if it turns out that the customer cannot make a good title and the land is not conveyed, provided the broker acted in good faith in the matter. In the opinion of a majority of the court those cases were rightly decided. The question is the same in the two cases; the only difference is that in one case payment is to be made in money, in the other, by a conveyance of other land.

Digitized by Google

Where the broker is employed to get a customer to buy and pay for his principal's land, and it turns out that the customer is not able to pay for the land, it is settled that his inability to do so does not deprive the broker of his commission, provided the principal made a valid and binding agreement for the sale of the land with the customer produced by the broker. *Ward* v. *Cobb*, 148 Mass. 518. *Burnham* v. *Upton*, 174 Mass. 408, 409. The ground on which this is settled is that by entering into a valid contract with the customer produced by the broker the principal accepts the customer as able, ready, and willing to buy the land and pay for it. In such a case the decision would have to be the other way were it not that, by entering into the contract with him, the principal accepts the customer produced by the broker; what the broker is employed to do is to produce a customer who will buy and pay for his principal's land. *Fitzpatrick* v. *Gilson*, *ante*, 477. If it turns out that the customer produced by the broker is not able to pay and does not pay for the land, the broker has not performed his duty and has not earned his commission; and it is only because the principal accepts the customer by entering into a valid contract with him, that it is held in cases like *Ward* v. *Cobb* that the broker has earned his commission. *Coleman* v. *Meade*, 13 Bush, 358. *Donohue* v. *Flanagan*, 9 N. Y. Supp. 273. *Francis* v. *Baker*, 45 Minn. 83. *Wray* v. *Carpenter*, 16 Col. 271. *Lockwood* v. *Halsey*, 41 Kans. 166. *Springer* v. *Orr*, 82 Ill. App. 558.

The law is settled in other jurisdictions in accordance with *Ward* v. *Cobb*, 148 Mass. 518. See *Francis* v. *Baker*, 45 Minn. 83; *Wray* v. *Carpenter*, 16 Col. 271; *Love* v. *Miller*, 53 Ind. 294; and generally that a broker makes out a case for a commission earned by proving a contract made. See *Cook* v. *Fiske*, 12 Gray, 491; *Rice* v. *Mayo*, 107 Mass. 550; *Keys* v. *Johnson*, 68 Penn. St. 42; *Veazie* v. *Parker*, 72 Maine, 443; *Conkling* v. *Krakauer*, 70 Tex. 735, 739.

The same rule obtains when the principal wants to buy in place of wanting to sell. Where the principal wants to buy one hundred bushels of wheat at a price named by him, and employs a broker to get him the wheat at that price, the broker earns his commission when he produces a customer and his principal makes a valid, binding agreement with the customer

Digitized by Google

for the wheat; and the broker's right to his commission is not affected by the inability or refusal of the customer to deliver the wheat. In such a case the broker has not produced a customer able to supply his principal with the wheat and would not have earned his commission had it not been that his principal by contracting with the customer had accepted him. In such a case the principal has a right to full compensation for the loss of his bargain by recovering damages for breach of the contract, and in the event which has happened the commission paid the broker is paid for that.

The rule is the same when the broker is employed to get for his principal a certain piece of land. If through the broker's efforts a binding contract is made between his principal and the owner of the land, the broker has earned his commission, and his right to it is not affected by the fact, if it turns out to be the fact, that the owner, the broker's customer, cannot make a good title. The principal has his remedy by recovering full damages for the loss of his bargain in an action at law on the contract, and in the event which then happens, it is for that, which the commission is paid.

We have no doubt that in this Commonwealth a party has a right to recover full damages for the loss of his bargain under a contract for the exchange or purchase of land where it turns out that the party who agreed to convey the land has not a good title. *Old Colony Railroad* v. *Evans*, 6 Gray, 25, 33. *Brigham* v. *Evans*, 113 Mass. 538. The rule which obtains in England and some other jurisdictions never has obtained here.

When a broker employed to procure a person to convey land to his principal, by way of sale or exchange, in good faith produces a customer as a person ready, able, and willing to do so, the principal has three courses of action open to him: (1) he may examine the title of the customer, and accept him or not accept him on learning the result of the examination; (2) he may enter into a contract with him, in which it is provided that his title shall be examined, and if it turns out that his title is not good the contract is at an end; or (3) he may enter into a binding contract with him for the conveyance of the land. In case he takes the third course of action he is given full compensation in damages for the loss of his bargain, if the

Digitized by Google

customer fails to fulfil his contract by conveying the land. Since the principal gets full compensation for the loss of his bargain in that event, there is no escape from holding that the broker has earned his commission when his efforts have resulted in the making of a valid contract. It does not lie in the mouth of a principal to say that the broker's commission has not been earned, when he has secured through the broker's efforts the land he wished, or full compensation for the loss of it. He cannot retain the right to this compensation and not pay for the broker's services in obtaining it for him.

When the broker knows that the customer produced by him has not a title, and omits to tell his principal of that fact, he has not acted in good faith, and has not earned his commission. *Burnham* v. *Upton*, 174 Mass. 408. *Butler* v. *Baker*, 17 R. I. 582.

It is stipulated in the agreed facts that if the plaintiff is entitled to recover, the amount to which he is entitled is $800. The entry must be

*Judgment for the plaintiff for* $800, *with interest from the date of the writ.*

*A. E. Burr*, for the plaintiff.

*G. R. Blinn*, for the defendant.

---

## CONGETA D'AMICO *vs.* CITY OF BOSTON.

Middlesex. March 23, 1900. — October 17, 1900.

Present: HOLMES, C. J., KNOWLTON, MORTON, BARKER, & LORING, JJ.

*Personal Injuries — Defective Way — City — Contract — Negligence — Action — Notice.*

If a city takes by right of eminent domain for a water basin land in a town within the limits of a highway which is at the same time discontinued, and contracts with the town to provide for the public a safe and convenient way for travel over or around the discontinued way until the completion of a new way to be substituted therefor, which contract is ratified by statute, a person who, while travelling on the old way, which is continually in use by the public before the completion of the new way, no temporary way around the old way being con-

Digitized by Google

structed, is injured by a defect in the old way, may maintain an action against the city for his injury, and he is not bound to give the notice required by Pub. Sts. c. 52, § 19.

TORT, for personal injuries occasioned to the plaintiff by a defect in a way in Southborough which the defendant city was alleged to be bound to keep in repair. Trial in the Superior Court, before *Blodgett*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

*J. J. Shaughnessy*, for the plaintiff.

*S. M. Child*, for the defendant.

LORING, J. We are of opinion that the ruling directing a verdict for the defendant was wrong. The city of Boston had taken by right of eminent domain a large tract of land in Southborough for the purpose of constructing on it a water basin in connection with its water supply. A portion of the highways which had been laid out through this tract of land before it was taken by the city were discontinued, and among others the way on which the plaintiff was driving, when the accident occurred causing the injuries complained of in this action. The city had made a contract with the town of Southborough to do the work made necessary by the discontinuance of these ways, by the relocation of other ways in this tract, and by changing the grade of still other ways in it. The ways discontinued were marked blue on a plan referred to in this contract, those relocated were marked red, and those the grade of which was changed were marked yellow. In this contract was the following covenant of the city of Boston: "Said city . . . shall secure to all persons desiring to use any of said parts shown in red, yellow or blue, a safe and convenient way of travel over or around each part from the time said city shall construct or commence work on the same until the completion of the substitute therefor in the manner aforesaid, and shall at all times during the progress of its work secure safe and convenient ways of travel between Southborough and the neighboring towns, and between the different parts of said town." This contract was ratified and confirmed by St. 1894, c. 108.

The plaintiff, with three others, was driving from Fayville to Marlborough on one of the ways which had been discontinued.

Digitized by Google

It is stated in the bill of exceptions that this way, though discontinued, "had been continually in use by the public. . . . There was no other road open for travel between Fayville and Marlborough at the time. . . . The road remained open the same as it was when the land was taken by the defendant, and no notices were posted or anything done to indicate that the road was not to be used. . . . The road to be substituted for this road under the said contract with the town of Southborough was being constructed but not completed at the time of the accident. The defendant was engaged at this time in the construction of the new roads called for in the contract between the city of Boston and the town of Southborough."

There was evidence that the discontinued way over which the plaintiff was travelling was in a defective condition, and, if the defendant owed the plaintiff any duty in keeping it in a safe condition for travel, that it was negligent in allowing it to be in the condition in which it was at the time of the accident.

We are of opinion that the defendant had invited the plaintiff to use the way in question, and therefore owed him the duty of not exposing him to a dangerous condition which reasonable care on its part would have prevented. *Holmes* v. *Drew*, 151 Mass. 578.

In *Moffatt* v. *Kenny*, 174 Mass. 311, it was held that if the owner of land lays out a road or way on his own land connecting two public highways, and constructs it in all respects like a public way, he has not thereby represented that the way is a public way, nor has he thereby invited the public to use it, if in fact the way was intended for the convenience and use of the abutters on the road or way in question. In that case notices had been posted stating that the way was not a public way. In *Stevens* v. *Nichols*, 155 Mass. 472, it had been previously held, under the facts appearing in that case, that the failure to post a notice that the way was not a public way did not change this result. On the other hand, it was held in *Holmes* v. *Drew*, 151 Mass. 578, that an owner who constructs a sidewalk uniform in appearance in part on his own land and in part within the limits of a public way, impliedly invites the public to use the whole walk as part of or as a public way.

In the case at bar the defendant must be taken to have left

Digitized by Google

the way open intending that it should be used by the public as a way and not for the use of abutters.

The defendant, by taking for a water basin the land within the limits of the old highway which was at the same time discontinued, became the owner of the land in fee. Under its contract with the town of Southborough the defendant was bound to provide for the public "a safe and convenient way of travel," either over or around the discontinued way while the new way was in process of construction. It did not construct a temporary way around the discontinued way, and therefore in leaving the old way open for travel the defendant must be taken to have elected to leave "a safe and convenient way of travel" over the discontinued way in place of around it.

While it is true that the plaintiff cannot sue on the contract under which the way was left open, since he was not a party to it, the contract is important as showing that the way was left open for the use of the public; if it was left open for the use of the public, there is an invitation to the public to use it, and the case falls within *Holmes* v. *Drew*, 151 Mass. 578.

It is stated in the bill of exceptions that "on behalf of the defendant there was evidence that there was another road open for travel between Fayville and Marlborough, but that it was not then made, it was being constructed but not completed, it being one of the new highways to be built by the city of Boston under its agreement with the town of Southborough." All that this can fairly be taken to mean is that the new way, though not completed, was in fact used by the public. But the defendant's obligation to provide a temporary road was not ended "until the completion of the substitute therefor"; this evidence did not show that that time had arrived.

As the city of Boston acquired the fee in the old highway, and made the contract to do the work of constructing these roads in the construction of a new water basin for its water supply, which is conducted by it as a commercial undertaking, it is liable to the same extent to which an individual would have been liable in making such a contract, and the plaintiff was not bound to give the notice required by Pub. Sts. c. 52, § 19.

*Exceptions sustained.*

Digitized by Google

# INDEX.


ABATEMENT.

See TAX, 3.

ABORTION.

At the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman and for causing her death, certain cards found in the defendant's trunk in the room occupied by him tending to show that he held himself out as a person whose business it is to procure abortions, although not stating the fact in precise terms, are admissible in evidence against him; and the District Attorney is properly allowed to argue to the jury what their meaning is. *Commonwealth* v. *Barrows*, 17.

ACCEPTANCE.

See CONTRACT, 3, 4.

ACCIDENT.

See PROMISSORY NOTE, 7.

ACCIDENT INSURANCE.

See INSURANCE, 1, 3.

ACCOUNT.

See ATTORNEY AND CLIENT, 1, 6; INTEREST; LIMITATIONS, STATUTE OF, 2; MECHANIC'S LIEN, 5; PARTNERSHIP, 2; PRINCIPAL AND AGENT, 2.

ACCOUNT ANNEXED.

See DECLARATION.


Digitized by Google

## ACTION.

1. After a trustee in bankruptcy has been discharged as trustee and the estate has been closed up and settled, he may maintain an action for the benefit of the bankrupt with the bankrupt's consent. *Stone* v. *Jenkins*, 544.
2. A promissory note, signed by a married woman, payable to the order of her husband, and indorsed by him, having been avoided by her, the holder can resort to the original contract and maintain an action on the common counts for money lent or money had and received. *National Granite Bank* v. *Tyndale*, 547.
3. An action cannot be maintained against a landlord for personal injuries occasioned to a visitor of one of the tenants by falling into an opening or cellar way while passing along a walk separating the two rows of tenements, if the walk was in good repair and in the same condition in which it was when the tenant hired his tenement, and the danger arising from the proximity of the opening was not concealed but apparent. The plaintiff being the guest of the tenant and using the walk under his authority had no greater claim to protection than he had. *Roche* v. *Sawyer*, 71.
4. At the trial of an action under St. 1887, c. 270, § 1, cl. 2, for injuries sustained by a lineman in the employ of the defendant by contact with an electric wire of a third person at a point where, by the chafing of the wire against a tree, the insulation had been worn off and the tree charred, it appeared that the defective insulation and the charred spot on the tree were concealed by foliage and were unknown to the defendant or his foreman under whose orders the lineman was working, and it was doubtful whether the indications of danger could not have been more easily seen by the lineman than by the foreman, if they could have been seen by the foreman at all. *Held*, that the action could not be maintained. *Chisholm* v. *New England Telephone & Telegraph Co.* 125.

See Assumpsit; Beneficiary Association, 1; Broker; Carrier, 1; Contract, 7; Election, 2; Employers' Liability Act, 5; Equity, 9; Foreign Corporation, 1; Highway, 4; Laches; Libel, 1; Limitations, Statute of, 1; Master and Servant, 2; National Bank; Park Commissioners; Promissory Note, 1, 2; Set-off, 2; Sewer; Superior Court, 1; Trial, 11; Trustee Process, 3.

## ADJOURNMENT.

See Mortgage, 1, 2; Town, 2.

## ADMINISTRATOR.

See Estates of Persons Deceased, 1; Partnership, 2; Savings Bank, 1, 2, 4.

## ADMISSIONS.

See Evidence, 25.

Digitized by Google

ADVERSE POSSESSION.
See RAILROAD, 2.

AGENT.
See PRINCIPAL AND AGENT.

AGREED FACTS.
See WRIT OF ENTRY.

ALIEN.
See EMPLOYERS' LIABILITY ACT, 5.

AMENDMENT.

If amendments to pleadings have been regularly allowed by the court with the consent of the duly authorized attorneys of the adverse parties, the fact that an attorney who consented to one of the amendments, although regularly employed, did not enter his appearance of record until later is immaterial. *Rothschild* v. *Knight*, 48.

See MECHANIC'S LIEN, 2, 3, 6, 9; SUPERIOR COURT, 1; TRIAL, 13.

ANSWER.
See TRIAL, 10, 13.

APPEAL.

1. On an appeal in equity a judge's findings of fact, founded in part upon the oral testimony of witnesses heard before him, will not be set aside unless they are clearly wrong; and an auditor's report being part of the evidence makes, under the statute, a *prima facie* case in favor of the party whose claims it supports. *Willwerth* v. *Willwerth*, 265.
2. The indorsement on a bond given on taking an appeal from a municipal court, "Bond and Surety approved. Bond filed. N. T. M., Jr., Clerk," in the absence of anything further, sufficiently shows that the bond was approved by the court as required by St. 1888, c. 325, § 1. *Parke* v. *Mabee*, 236.

APPEARANCE.
See AMENDMENT; DIVORCE, 3, 4; JURISDICTION, 2.

ARBITRATION.
See EVIDENCE, 4.

Digitized by Google

## ASSESSMENT.

See BETTERMENTS; CONSTITUTIONAL LAW, 2-4; EVIDENCE, 7; SEWER; TAX, 3.

## ASSIGNEE IN INSOLVENCY.

See DECLARATION; LIEN; TRUST AND TRUSTEE, 4; TRUSTEE PROCESS, 3.

## ASSIGNMENT.

1. If a contract for the erection of a schoolhouse for a city is, without the consent of the city, assigned more than six months prior to the commencement of proceedings in insolvency by the assignor, the assignee thereof, who, after notice to the city of the assignment and the record thereof in the office of the city clerk, completes the contract at his own expense, and from time to time receives payments from the city on account of the work, is, upon completion of the building and its acceptance by the city, equitably entitled, as against the assignee in insolvency of the assignor, to the balance due under the contract, although by its terms the contract was not assignable without the written consent of the city; and if, prior to the assignment of the contract, the assignor had been paid by the city all that he had earned under it, an order by him on the city for the payment of a sum of money to a creditor not accepted by the city will not be deducted from such balance, nor will such balance be liable to an attachment by a creditor of the assignor in an action commenced by the trustee process within four months before the commencement of proceedings in insolvency. *Staples* v. *Somerville*, 237.
2. Under the pleadings in this case, which was a bill in equity by an administrator against the intestate's widow, alleging that a mortgage had been paid by the intestate and discharged by the mortgagee, but that afterwards the intestate, while embarrassed, had caused the mortgagee to execute an assignment to the defendant as though the mortgage had not been paid and discharged, for the purpose of defrauding his creditors, and praying that the defendant be ordered to execute a discharge, the judge would have been justified in finding, if the evidence warranted him in so doing, that the mortgage was duly assigned to the defendant, and that the legal title to it vested in her, and that there was no intent to hinder or delay her husband's creditors either on her part or his. *Anderson* v. *Learoyd*, 431.
3. The evidence in this case, which was a bill in equity to redeem land from a mortgage alleged to have been assigned by the plaintiff to the defendant as collateral security, warranted a finding that the assignment was absolute. *White* v. *Dame*, 542.

See ATTORNEY AND CLIENT, 1, 2; CHATTEL MORTGAGE; CONTRACT, 2; LIFE ESTATE; PROMISSORY NOTE, 3.

Digitized by Google

## ASSUMPSIT.

Assumpsit will lie by one surety against another on the contract implied from their relation as co-sureties to recover from him his share of the amount paid in settlement of the common liability; and even if there is an express agreement between them to contribute, it does not follow that assumpsit will not lie. *Weeks* v. *Parsons*, 570.

## ATTACHMENT.

See ASSIGNMENT, 1; EVIDENCE, 5; JURISDICTION, 1; LIFE ESTATE; TRIAL, 10.

## ATTORNEY AND CLIENT.

1. If, in an action for services performed and disbursements made, as an attorney at law, for the defendant, the account is a long one and the items relate to many different matters, the judge cannot be required to instruct the jury in regard to each item, nor in regard to all of the various aspects in which it is possible that the jury may view the different items. What he is required to do is to state for the guidance of the jury the rules of law in regard to the right of an attorney to recover for services, and in regard to the defendant's liability therefor, and what it is necessary for the plaintiff to show in order to maintain his action, accompanied by such explanations and references to the nature of the services rendered and the relations of the parties and the matters set up in defence, including the declaration in set-off, as will enable the jury to understand and apply the rules thus laid down; and having thus instructed the jury, he cannot be required to instruct them as to the various aspects in which the plaintiff may have acted as attorney for the defendant in connection with matters relating to an assignment of his property by the defendant to the plaintiff for the benefit of the defendant's creditors and to the trust created thereby, and to his right to recover reasonable compensation for services so performed. *Cooke* v. *Plaisted*, 374.
2. If, in an action for services performed and disbursements made, as an attorney at law, for the defendant, the fair import of the charge was, and the jury must have so understood it, that if the plaintiff was employed as attorney by the defendant, and performed services for him in that capacity in relation to any matters, he was entitled, in the absence of any special agreement, to a reasonable compensation therefor, taking into account the nature and importance of the services rendered, there being no contention by the defendant that to the extent to which the plaintiff's services and expenditures as attorney related to property covered by an assignment of the defendant's property to the plaintiff for the benefit of creditors, the plaintiff was obliged to resort to such property for payment, certain requests for rulings to the effect that if, after the termination of the assignment, the defendant requested the plaintiff to render service or

Digitized by Google

expend money in relation to the property covered by the assignment, the defendant was liable to the plaintiff, and that if a note in an insolvency matter, even if originally included in the assets covered by the assignment, was proved by the defendant as his own property and in his own name, he was liable to the plaintiff for all services done and expenditures made relating to the note, were rightly refused. *Cooke* v. *Plaisted*, 374.

3. In an action for services performed as an attorney at law for the defendant, a request for a ruling that "if the jury shall find that the services" in a certain suit "were rendered in whole or in part for the real benefit of others in connection with the defendant, yet if he promised to pay the plaintiff for them he must be charged for what they were reasonably worth," is rightly refused, there being no contention by the defendant that he was not liable for services rendered in connection with the action, if they were in whole or in part for the benefit of others. *Ibid.*
4. If an assignment in trust by A. to B. for the benefit of A.'s creditors was substantially terminated at a certain date, in an action by B. against A. for services rendered as an attorney at law, a request for a ruling that "the termination of a trust created by writing need not be in writing. It may be determined by agreement or consent, or by the acts of the parties in interest," becomes immaterial and is properly refused. *Ibid.*
5. In an action by B. against A. for services rendered as an attorney at law, a request that "if the jury shall find that the sums mentioned in the defendant's declaration in set-off, or any of them, were received by the plaintiff as a part of A.'s assets, passing by virtue of the assignment [of A.'s property to B. and F. for the benefit of creditors], they were received by the plaintiff, together with F.; that they are not a proper subject of set-off in this action, and the verdict of the jury as to such items, or any of them so received, must be for the plaintiff," is rightly refused, and the case having been left to the jury becomes immaterial, B. being severally and personally liable, and not jointly with F., for the money which he had himself received and with which he had credited A. *Ibid.*
6. In an action for services performed as an attorney at law for the defendant, the plaintiff cannot object to the admission of testimony relating to foreclosure proceedings and to the deed under the power contained in the mortgage, he having already testified to the foreclosure proceedings, and his services in regard to them being the subject of one or more of the items in his account. *Ibid.*

See AMENDMENT; LIEN; TRIAL, 5.

## AUCTION.

See PRINCIPAL AND AGENT, 2.

## AUDITOR.

See APPEAL, 1; EXCEPTIONS, 5.

Digitized by Google

## BANK.

See ESTATES OF PERSONS DECEASED, 2; EVIDENCE, 19, 20; NATIONAL BANK; PROMISSORY NOTE, 6; SAVINGS BANK.

## BANKRUPTCY.

See ACTION, 1.

## BASTARDY PROCESS.

If the surety upon a bond given under the bastardy act surrenders the principal to the Superior Court, when the complaint is pending there, by the provisions of Pub. Sts. c. 85, § 8, the bond becomes void. *Fitzpatrick* v. *Nordstrom*, 231.

## BENEFICIARY ASSOCIATION.

1. The substitution of the second certificate for the first issued by a benefit association being effective as between the member and the corporation, an invalid designation in the second has no different effect from what it would have had in the first, and an action may be maintained on the second certificate by the executrix of the member. *Doherty* v. *A. O. H. Widows' & Orphans' Fund*, 285.
2. The charter of a foreign corporation provided that upon the death of a member there might be paid out of the "Widows' and Orphans' Benefit Fund" a certain sum "to his family, or as he may direct." The certificate was issued in 1888, the beneficiary, who was the member's wife, died in 1895, and the member died in 1897. In the last named year, prior to his death, a by-law was amended so as to read that if, on the death of all the beneficiaries before that of a member, he should make no further designation of beneficiaries, the benefit should be paid to his next of kin. The member made no further designation. *Held*, on a bill in equity by the only next of kin of the member against the uncle and next of kin of the member's wife, who was the member's executor and sole legatee, that the by-law as amended was valid, and that the plaintiff was entitled to the fund. *Pease* v. *Royal Society of Good Fellows*, 506.

See EQUITY, 1, 4.

## BETTERMENTS.

1. In assessing betterments under St. 1893, c. 339, and St. 1894, c. 439, upon abutters on a public way for special benefits received by them from its construction, such construction, the laying of sewers and connections, and the establishment of building lines may be considered as one improvement, and the entire cost set off against the benefit thereof. *Lincoln* v. *Street Commissioners*, 210.



Digitized by Google

2. The provision of St. 1893, c. 339, § 2, that in determining the cost of the construction of a certain way in B., "the expenses for gas pipes, water pipes, their connections, and the laying thereof," are to be excluded, and a proportional share of the cost is to be assessed upon the real estate which it is adjudged "receives any benefit and advantage from such laying out, construction, and laying of sewers and pipes as aforesaid beyond the general advantages to all real estate" in B. to the extent of the total amount of such adjudged benefit and advantage, merely indicates in general terms the benefits to be assessed for, and does not intend an improper enhancement of, estimated benefits by the use of the word "pipes," which, if of any importance, is satisfied by the water pipes which are laid by the city. *Lincoln* v. *Street Commissioners*, 210.

3. An assessment of betterments for the construction of a way may be erroneous if not laid upon estates liable thereto by reason of the adoption of a mistaken principle of law, but not by reason of a mistaken finding of fact that such estates were not specially benefited. *Ibid.*

See CONSTITUTIONAL LAW, 4; EVIDENCE, 7.

BOND.

See APPEAL, 2; BASTARDY PROCESS; CORPORATION, 7; ESTATES OF PERSONS DECEASED, 1; JOINT STOCK COMPANIES; SAVINGS BANK, 4.

BOSTON.

See CONSTITUTIONAL LAW, 2–5; EVIDENCE, 8–10; PARK COMMISSIONERS; SEWER.

BOUNDARY.

See MECHANIC'S LIEN, 2.

BROKER.

1. In an action to recover a commission for services as broker, evidence from which the jury may find that the plaintiff was employed to procure for the defendant a customer who would lend upon a note and certain real estate a certain sum, and that the plaintiff found a customer who was ready to make such a loan as the arrangement between the plaintiff and the defendant called for, and that the failure to consummate the proposed transaction was through the fault or neglect of the defendant, is sufficient to warrant a verdict for the plaintiff. *Wright* v. *Young*, 100.

2. The contention that a broker who was employed "to procure a loan" does not earn his commission unless the money to be borrowed is actually paid over, or a valid contract is made by which the customer procured by the broker agrees to lend the money, and that this applies to a case where the loan is not made, because, by reason of the defect in his title, the

Digitized by Google

borrower is not able to give the mortgage he stipulated to give to the customer procured by the broker, is unsound. If there is evidence which would warrant a jury in finding that the plaintiff found a customer accepted by the defendant who was able, ready, and willing to make the loan, and the jury so find, the plaintiff is entitled to recover; and it is immaterial that the defendant's written application to a savings bank for a loan contains the provisions "that the said title will not be deemed to be satisfactory if the estate is held subject to any condition," and that the defendant is to "pay a commission of two per cent." *Fitzpatrick* v. *Gilson*, 477.

3. If a broker is employed to find a person to convey land to be paid for by a conveyance of other land, that is to say, to effect an exchange, and the principal makes a valid agreement with the customer produced by the broker, the broker has earned his commission, even if it turns out that the customer cannot make a good title and the land is not conveyed, provided the broker acted in good faith in the matter. *Roche* v. *Smith*, 595.

## BUILDINGS.

See ASSIGNMENT, 1; CONTRACT, 7; EVIDENCE, 1, 10; LANDLORD AND TENANT; MECHANIC'S LIEN, 1–3, 6–9; NEGLIGENCE, 1, 3.

## BURDEN OF PROOF.

See WILL, 3, 4.

## BY-LAW.

See BENEFICIARY ASSOCIATION, 2; EVIDENCE, 3, 18; SAVINGS BANK, 4; TRIAL, 2.

## CARRIER.

1. At the trial of an action against the B. & A. Railroad Company and the W. Palace Car Company for the loss of a travelling bag, it appeared that the plaintiff was a passenger on a sleeping car of the W. Company, which was hauled with other cars from Albany to Boston by the B. & A. Company, leaving Albany at three o'clock in the afternoon and arriving at Boston at nine in the evening; that the W. Company had no control of the car in so far as its movement over the roadbed was concerned, but retained the internal management thereof and hired the porter and conductor for the car; that the porter carried the bag to the section nearest the front door of the car; that the plaintiff remained by it for ten minutes and then went into the smoking compartment of the car at the rear end; that he remained there half an hour, and then returned to his section, took something out of his bag, and returned to the smoking compartment and remained there until the train was approaching Boston; that he then

Digitized by Google

went to his section but the bag was gone, search was made for it but it could not be found ; that the train made three stops between Albany and Boston; that the porter testified that he received one passenger at the first stopping-place but none at the other two ; that two passengers left the car at the second stopping-place, neither of whom had a hand bag; that no passengers left at the other stations, and that while the train was in motion passengers walked back and forth from the other coaches. He further testified that there were three sleeping cars on the train, and it appeared that there were also ordinary cars. *Held*, that the plaintiff was not in the exercise of due care, and that there was no evidence of a breach of any duty which either of the defendants owed the plaintiff. *Whicher* v. *Boston & Albany Railroad*, 275.

2. A common carrier may limit its liability in case of loss by stipulations concerning the value of the property which it undertakes to convey; and the only qualification is that the stipulation shall be brought home to the knowledge of the shipper under such circumstances that his assent to it can fairly be assumed to have been given; and if he accepts and acts upon it without dissent he will be presumed to have agreed to it ; and in this case, which was an action against an express company to recover the value of a box containing paintings of great value intrusted to it for carriage and delivery, and lost by it and never delivered, the plaintiff, *on the* undisputed facts, must be held to have assented to the limitation of the defendant's liability contained in the receipt, and the stamping by the messenger on the receipt of the words " value asked and not given," without the knowledge or consent of the plaintiff, was an immaterial circumstance. *Graves* v. *Adams Express Co.* 280.

See Sale.

## CEMETERY.

See Estates of Persons Deceased, 4.

## CERTIFICATE.

See Beneficiary Association, 1 ; Equity, 1, 4 ; Evidence, 6; Insurance, 1 ; Partnership, 3 ; Trade-mark, 1, 2.

## CERTIORARI.

In this case, which was a petition for a writ of certiorari to quash the proceedings of county commissioners in relocating, widening, and laying out a street in one town by taking land within the limits of another town, and by ordering that town to pay for the land so taken and to construct a portion of the street, the delay in bringing the petition and the circumstances occurring between the final order of the respondents and the filing of the petition make it unjust to quash the proceedings. *Watertown* v. *County Commissioners*, 22.

See Evidence, 7.

Digitized by Google

## CHARITY.

See Public Charity.

## CHATTEL MORTGAGE.

An unrecorded mortgage of personal property, partly in possession and partly after acquired, not delivered to and retained by the mortgagee, is not valid against the assignee of the mortgagor under a voluntary assignment for the benefit of creditors. *Wilson* v. *Esten*, 14 R. I. 621, distinguished. *Chick* v. *Nute*, 57.

See Estates of Persons Deceased, 1.

## CITY.

See Assignment, 1; Eminent Domain, 1; Highway, 3, 4; Intoxicating Liquors, 2; Mechanic's Lien, 1; Receiver.

## CODICIL.

See Trust and Trustee, 5; Will, 3; Witness, 2.

## COERCION.

See Divorce, 1; Injunction.

## COLLATERAL INHERITANCE TAX.

See Tax, 1, 2.

## COLLATERAL SECURITY.

1. The St. of 1898, c. 577, relative to small loans and the redemption of the security therefor is not vague, defective, uncertain, and silent upon essential points, and hence void in that § 1 sets out no penalty, and § 10 does not define the offence. The fact that we have to look to other sections of the statute to ascertain the provisions as to a license, and to what loans the statute applies, does not render the statute defective, vague, and uncertain. Section 1 says nothing about a penalty and applies to single loans, while § 10 applies to the engaging in, or carrying on of, the business of making such loans; and the offence alleged must be proved by showing a number of distinct acts of the kind forbidden in § 1. *Commonwealth* v. *Morris*, 19.
2. The contention that the St. of 1898, c. 577, relative to small loans and the redemption of the security therefor, being silent as to the period of time for which the charging of more than twelve per cent is unlawful, is

Digitized by Google

therefore vague and uncertain, is unsound, as the meaning is plain, and the words "per annum" or "for a year" are to be understood; and the language of the complaint must have the same meaning; and the complaint is not defective in not stating the period of time for which interest was to run. *Commonwealth* v. *Morris*, 19.

3. At the trial of a complaint under the St. of 1898, c. 577, relative to small loans and the redemption of the security therefor, it is competent to show that, while the notes and mortgages purported to be at a rate of interest not greater than twelve per cent per annum, the defendant in each instance deducted from the amount set out in the notes and mortgages certain amounts as expenses of making and securing loans, and that the total of these sums, and the interest actually charged and received as interest, were in each instance in excess of twelve per cent per annum and other charges allowed by the statute. *Ibid.*

See ASSIGNMENT, 3; CONSTITUTIONAL LAW, 6; CONVERSION; CORPORATION, 2–5; ESTATES OF PERSONS DECEASED, 2.

## COMMISSIONS.

See BROKER; TRUST AND TRUSTEE, 3.

## COMMON CARRIER.

See CARRIER.

## COMPLAINT.

1. As a general rule it is sufficient to charge an offence in the words of the statute. *Commonwealth* v. *Danziger*, 290.

2. A complaint under St. 1891, c. 58, as amended by St. 1896, c. 377, § 1, for having in possession with intent to sell oleomargarine in imitation of yellow butter produced from unadulterated milk or cream, may be made by an assistant of the board of agriculture. *Commonwealth* v. *Mullen*, 132.

3. A complaint under St. 1891, c. 58, as amended by St. 1896, c. 377, § 1, which alleges that the oleomargarine was in imitation of yellow butter produced from unadulterated milk or cream, sufficiently shows that the proviso "that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter," does not apply. *Ibid.*

4. A motion to quash a complaint under St. 1891, c. 58, as amended by St. 1896, c. 377, § 1, on the ground that it does not allege that the substance "was not renovated butter," is rightly overruled, having renovated butter in possession with intent to sell being made an offence by another statute. *Ibid.*

Digitized by Google

5. A motion to quash a complaint under St. 1891, c. 58, as amended by St. 1896, c. 377, § 1, on the ground that "the complaint is in the alternative when it alleges that the substance was made from adulterated cream or milk," is rightly overruled, the complaint making no such averment, but alleging that the oleomargarine was made partly out of oleaginous substance not produced from unadulterated milk or cream. *Commonwealth* v. *Mullen*, 132.

See COLLATERAL SECURITY, 2, 3; MILK; TRADE-MARK, 2, 3.

## COMPROMISE.

See LIEN.

## CONDITION.

See CONTRACT, 7; DEED, 1; EVIDENCE, 16; INSURANCE, 2, 3; SALE.

## CONSIDERATION.

See CONTRACT, 2, 6; PROMISSORY NOTE, 1, 4; TRUST AND TRUSTEE, 1.

## CONSIGNOR AND CONSIGNEE.

See CONTRACT, 4.

## CONSPIRACY.

See INJUNCTION.

## CONSTITUTIONAL LAW.

1. In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the Constitution in its application to cases which may be expected to arise. *Dexter* v. *Boston*, 247.
2. An assessment under St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston," being required to be made according to the lineal measurement of the land along the sewer, that parcel, which receives but slight additional benefit from a turn in the sewer, is doubly assessed; and the statute in this respect is unconstitutional. *Ibid.*
3. The decision in *Weed* v. *Boston*, 172 Mass. 28, as to the unconstitutionality in certain respects of St. 1892, c. 402, entitled "An Act relating to sewers in the city of Boston," is reaffirmed. *Ibid.*
4. The St. 1893, c. 339, providing for the construction of Boylston Street, in the city of Boston, and the assessment of betterments for the cost thereof, is constitutional, and under it special benefits may be assessed

Digitized by Google

without assessing public or general benefits. *Lincoln* v. *Street Commissioners*, 210.

5. Section 17 of St. 1897, c. 500, authorizing the construction of a tunnel from Boston to East Boston and the execution of a lease of the tunnel, when completed, to the Boston Elevated Railway Company, for twenty-five years from the date of that act, at the rental specified in the same section, and § 18 of the same statute, authorizing the city treasurer to issue bonds of the city to pay the cost of construction of the incline, etc., and other bonds to a certain amount, the proceeds thereof and of $7,000,000 in bonds authorized by St. 1894, c. 548, to be applied to the payment of the expenses of constructing, etc. the subways authorized by said St. 1894, c. 548, § 25, and of the tunnels, etc. provided for in the preceding section, are not unconstitutional, as calling for an unwarranted exercise of the power of taxation, as taking the property of the city without reasonable compensation or due process of law when a lease, as provided by statute, is executed to the Boston Elevated Railway Company, or as impairing the obligation of a contract already made by the Boston Transit Commissioners with the West End Street Railway. *Browne* v. *Turner*, 9.
6. The St. of 1895, c. 497, entitled "An Act to regulate the making of loans upon deposits or pledges of personal property" is constitutional. *Commonwealth* v. *Danziger*, 290.

See HUSBAND AND WIFE; TRADE-MARK, 3; WITNESS, 1.

## CONTEMPT.

See RAILROAD, 1.

## CONTINUANCE.

See SET-OFF, 2.

## CONTRACT.

### I. *Making.*

See CARRIER; CONTRACT, 3; EQUITY, 9; INDORSEMENT, 1.

### II. *Consideration.*

1. In this case, which was a suit in equity to obtain the execution of a release of a portion of the land included in a mortgage, the evidence warranted the decree for the plaintiffs. *Gross* v. *Milligan*, 566.
2. If a mortgagor of land, in order to free certain lots from the mortgage, having applied for a loan to be secured by a mortgage of the balance of the land, consents to the loan being carried through by an assignment to the lender of the original mortgage and by giving a second mortgage excluding the lots in question, upon the assurance of the lender's agent, who conducts the negotiations, that those lots will be released as soon as the second mortgage is executed, the lender cannot set up the statute of

Digitized by Google

frauds in defence of a suit in equity to obtain the release; and the objection that there is no consideration for the agent's promise, but that the consideration is the money named in the mortgage, and that is expressed in writing and cannot be added to or contradicted, is untenable. *Gross* v. *Milligan*, 566.

See CONTRACT, 6; PROMISSORY NOTE, 1, 4; TRUST AND TRUSTEE, 1.

III. *Validity.*

3. If B. amends his written offer to A. by telephone, the acceptance of the amended offer does not make a contract good against the statute of frauds, because one essential term of the agreement to be performed is not stated otherwise than by parol; and A. cannot recover on the written offer, because he has not accepted it; nor can he recover upon the amended offer, because no sufficient memorandum of its terms has been signed by B.; and the doctrine of substituted performance has no application, because no contract, good under the statute, has been entered into, *Wiessner* v. *Ayer*, 425.

See CARRIER, 2; EQUITY, 2; INSURANCE, 2; INTEREST; TOWN, 2.

IV. *Construction.*

4. A written order addressed to A., who accepts it, directing him to pay to B., "from equities on hosiery consigned to you," a sum named, "and charge the same to our account," and signed by C., is a direction to pay only from the fund designated, which is the sum to become due to C. by reason of the consignment made by him to A. when the transaction shall be closed, and is not limited by the net proceeds of sales improperly made, but includes whatever sum should have been realized from sales made in accordance with the terms of the consignment. *Morrison* v. *Lamson*, 536.

5. A., who was the holder of a patent, gave B. by contract in writing an exclusive license to manufacture and sell articles under the patent for its full term, except as thereinafter provided. B. agreed, among other things, to pay A. $500, to manufacture and sell articles under the patent and to pay certain royalties. Then came this clause, "The party of the second part (B.) further agrees that, if in any year the royalty above referred to shall not amount to the sum of five hundred dollars, then it will either pay to the said party of the first part (A.), within sixty days of the termination of the year, the sum of five hundred dollars, as liquidated royalty, or will submit to the cancellation of this license at the option of the party of the first part." *Held*, in an action by A. against B. to recover $500 as liquidated royalty, that the contract gave the choice to B. whether he would pay or submit to a cancellation. *Prouty* v. *Union Hardware Co.* 155.

6. A. entered into a written agreement, dated December 7, 1898, with L to sell and convey, on January 7, 1899, certain land on certain terms. Five hundred dollars was deposited by L. with F. as part of the purchase price, and was to be paid over by him to A. in thirty days. L. being unable to carry out this agreement, on January 11 another in writing was entered

Digitized by Google

into extending the time to February 1, and providing that if L. were unable to carry out the agreement of December 7 he was to pay $2,000, and give a second mortgage of $12,072, and A. was to convey, subject to a mortgage held by P., who, it appeared, held two mortgages both overdue. If L. were unable to perform the modified contract, F. was to pay over to A. after February 1 the deposit. On February 1 the plaintiff's attorney appeared at the time and place agreed on with a deed to L. conveying the property subject to the two mortgages to P., and L. was informed at or about the same time that the attorney had discharges of these mortgages ready for him. L. was unable to perform his agreement, and, at his request, A.'s attorney gave him more time. On the following day, L. having requested an extension of the two mortgages, an extension was duly executed by P. and delivered to A.'s attorney. Afterwards, at L.'s request, A.'s attorney agreed to wait till March 1, L. saying that if he was not ready he authorized F. to pay over the money. On March 1 A. was ready at the place appointed to deliver the deed, but L. did not appear. *Held*, in an action by A. against F. to recover the deposit, that if the proper construction of the agreement of January 11 was that the property was to be conveyed subject to one mortgage to P., that objection was waived by L.; that the oral modifications of the agreement of January 11 were not within the statute of frauds; and that there was ample consideration for L.'s agreement as to F.'s paying over the money, and after L.'s default F. held it as money had and received to A.'s use. *Hurlburt* v. *Fitzpatrick*, 287.

See ASSIGNMENT, 1; GUARANTY; INSURANCE, 1, 3; PARTNERSHIP, 1.

V. *Performance and Breach.*

7. Where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, he may recover for what he has done, one of the implied conditions of the contract being that the building should continue to exist. *Angus* v. *Scully*, 357.

See CONTRACT, 3, INSURANCE, 3; MECHANIC'S LIEN, 4.

VI. *Rescission.*

See CONTRACT, 6.

## CONTRIBUTION.

See FRAUDS, STATUTE OF; PARTIES; PRINCIPAL AND AGENT, 2; SET-OFF, 2.

## CONTRIBUTORY NEGLIGENCE.

See CARRIER, 1; EMPLOYERS' LIABILITY ACT, 3; EVIDENCE, 25; NEGLIGENCE, 1, 2, 4–8; TRIAL, 9.

Digitized by Google

## CONVERSION.

1. In this case, which was an action for the conversion of certain horses which had been boarded by the plaintiff with the defendant, a stable keeper, there was no evidence which would warrant a finding that the defendant said or did anything that constituted a waiver of his right to insist upon the whole amount due him under the written agreement in evidence, and to hold the property as security therefor. *Radigan* v. *Johnson*, 433.
2. The fact that, while attempting to arrive at a settlement of the amount due for the board of the plaintiff's horses in the defendant's stable, the latter's counsel may have asserted for the moment a larger right than he could successfully maintain would not of itself constitute a conversion by the defendant, it being clear that he was entitled to possession as pledgee. *Ibid.*
3. If the owner of horses which have been boarded with a stable keeper executes an instrument by which he relinquishes to the latter all claim on the horses "until his claim of" a sum named "for board and care is paid in full, which I agree to do by weekly payments of" a certain sum, what was said after the instrument was signed, in regard to the use by the owner of the property, would not affect the right of the stable keeper to hold it as pledgee for any balance that might be due. *Ibid.*

See ELECTION, 1; EVIDENCE, 23.

## CORPORATION.

1. Promoters of a corporation, who, before any capital stock has been issued to the public, cause to be issued to themselves, as a remuneration for their services as such promoters, by the vote of all persons who then had any interest in the corporation, they being the promoters, one third of the whole capital stock, and then issue a prospectus to the public inviting subscriptions to the stock without disclosing that fact, are guilty of a fraud, and are liable to a suit in equity, which should be brought in the name of the corporation and not in that of the receiver, to account for the net profits received by them, less the expenses of the formation of the corporation paid by them, the plaintiff having the option to follow the shares or the proceeds or to recover damages, and not being obliged to tender back the lands acquired by the corporation under a contract executed in pursuance of the vote above named; and the objections that the suit was being prosecuted for the benefit of certain persons to the exclusion of other creditors of the corporation, and that it was not proved that the persons named were creditors, are not tenable on the facts in this case. *Hayward* v. *Leeson*, 310.
2. The form of the stock certificate is conclusive as to the name in which a vote must be offered. *J. H. Wentworth Co.* v. *French*, 442.
3. In Pub. Sts. c. 105, § 25, providing that the name of the "pledger" of stock held as collateral security shall be set forth in the certificate, and

Digitized by Google

that he shall be responsible as stockholder, "pledger" means the general owner of the stock at the date when the certificate is issued. *J. H. Winsworth Co.* v. *French*, 442.

4. When the statute is complied with, the "pledger" is entitled to vote. *Ibid.*
5. A certificate of stock running to A., but stating on its face that it is held as collateral for the note of B. for $10,000, issued after B. had sold his rights to C., does not satisfy Pub. Sts. c. 105, § 25. Under such a certificate A. is the stockholder and entitled to vote. *Ibid.*
6. It appearing that the equities were against the party having the legal right to vote and claiming an office by virtue of his exercise of the right, a writ of mandamus was refused. *Ibid.*
7. A loan and trust company, upon the sale by it of a bond of another corporation, has power to guarantee the payment of such bond to the purchaser. *Broadway National Bank* v. *Baker*, 294.

See Beneficiary Association; Creditors; Evidence, 2–4, 18; Foreign Corporation; Guaranty; Indorsement, 1; Joint Stock Companies; Principal and Agent; Promissory Note, 5–8, 10; Public Charity, 1; Trial, 2, 4, 10, 11.

## COSTS.

The allowance of fees to a witness in the taxation of costs upon a certificate signed in his name by his duly authorized agent and not by his own hand, is not erroneous, and, if it were, it is at least doubtful whether the mistake could be taken advantage of by a writ of error. *Rothschild* v. *Knight*, 48.

See Trustee Process, 2.

## COUNTY COMMISSIONERS.

See Certiorari; Eminent Domain, 2; Railroad, 1.

## COVENANT.

See Eminent Domain, 8; Landlord and Tenant, 2.

## CREDITORS.

A creditor, at whose request receivers have been appointed to administer the assets of a corporation, and who, together with all other parties in interest, has assented to a decree directing the receivers of a corporation to carry on the business as a going concern, and out of the money then on hand or thereafter to be received to pay all outstanding commercial paper of the corporation as it should mature, together with all legitimate expenses, and who also has assented to a later decree directing a sale of the assets and the raising of a fund then in court, cannot justly compel the

Digitized by Google

holders of the commercial paper and the receivers to await the ultimate determination of the amount of his claim pending in another jurisdiction, and, if it should be so large that all demands and expenses could not be paid in full, to have partial payment only. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 151.

See ASSIGNMENT, 2; CHATTEL MORTGAGE; CORPORATION, 1; TRUST AND TRUSTEE, 3.

## CRIMINAL LAW.

See ABORTION; COLLATERAL SECURITY; COMPLAINT; LORD'S DAY; MILK; TRADE-MARK, 2, 3.

## CUSTOM.

See INTEREST, 1; NATIONAL BANK; SALE.

## DAM.

See EMINENT DOMAIN, 1.

## DAMAGES.

See CONVERSION, 1, 2; CORPORATION, 1; EMINENT DOMAIN, 1, 2, 5–9; EVIDENCE, 8–10; LIBEL, 1; PARK COMMISSIONERS; SLANDER, 1.

## DEATH.

See DIVORCE, 1; EMPLOYERS' LIABILITY ACT, 3, 6, 9; EQUITY, 4; EVIDENCE, 14, 15; INSURANCE, 1; PARTIES; PARTNERSHIP, 2; RESIDENCE, 1, 2.

## DECLARATION.

There is no necessary inconsistency between different counts of a declaration in an action by the assignee of an insolvent debtor, the first of which is upon an account annexed for "goods delivered" to the defendant by the insolvent debtor, the second of which alleges that the goods were conveyed to the defendant by the insolvent debtor to prevent them from coming to his assignee in insolvency, and the third of which alleges that the goods were so conveyed with a view to give the defendant a preference, and there is no such irregularity or imperfection as to affect the validity of a judgment for the plaintiff. *Rothschild* v. *Knight*, 48.

See LIBEL, 1.

## DECREE.

See CONTRACT, 1; CREDITORS; DIVORCE, 1, 3; RAILROAD, 1; RESIDENCE; SET-OFF, 2; WILL, 3; WITNESS, 2.

Digitized by Google

## DEED.

1. The owner of two adjoining lots of land, lot "A," on which was a store building, and lot "B," upon which was a dwelling-house occupied by him, conveyed lot "A" by deed containing the following provision: "And this conveyance is made upon the express condition that said W. [the grantee], his heirs and assigns, shall never erect any building nearer the street line of said land than the store building now thereon." The grantor's executors sold lot "B" to his widow, whose heirs conveyed it to J., and J. conveyed it to the plaintiff in this suit. *Held*, on a bill in equity to enjoin W. from building an addition to his store on lot "A," that the clause in question was a condition, and that upon full consideration of the whole deed in the light of the attendant circumstances the plaintiff had failed to show that this condition was created for the benefit of his land. KNOWLTON, MORTON, & LATHROP, JJ., dissenting. *Clapp* v. *Wilder*, 332.
2. A clause in a deed to a railroad corporation, "Reserving, however, a crossing or right of way to be maintained and kept in repair at the expense of said railroad corporation, and to be thirty feet wide and to cross said road or track on a line parallel with the southeasterly line of said Simpson's land and to be distant one hundred feet southwesterly therefrom," does not operate by way of exception, but only by way of reservation, and, in the absence of the word "heirs," does not operate beyond the life of the grantor. *Simpson* v. *Boston & Maine Railroad*, 359.

See ATTORNEY AND CLIENT, 6; EVIDENCE, 16; MECHANIC'S LIEN, 2.

## DEFINITIONS.

See WORDS.

## DELIVERY.

See MECHANIC'S LIEN, 8; SALE.

## DEMURRER.

See LIBEL, 2.

## DEVISE AND LEGACY.

1. In view of the history of the occupation of premises consisting of a lot with a barn on one side of a country road and a house just opposite on the other, a devise to A. of "the house in which he now lives, situated on B. Road, M., subject to a mortgage," etc., is construed to embrace the barn lot. *Dudley* v. *Milton*, 167.
2. A testator gave by will all his estate to his wife for life, and "whatever remains at her decease shall be divided into two equal parts to be inherited

Digitized by Google

and divided, the one moiety by my brothers and sisters and their heirs, and the other moiety by my said wife's brother and sisters and their heirs." *Held*, on the death of the widow, many years after that of her husband, that the words "and their heirs" were words of limitation, and that, subject to the widow's rights in the estate during her life, the fee in one moiety vested in the sisters and brother of the testator's wife who were living at the date of the will the day of the testator's death, as tenants in common, and that the other moiety vested in the brothers and sisters of the testator living at his death, as tenants in common. *Adams* v. *Jones*, 185.

3. A legacy "to the children of my deceased brothers and sisters" of "all the rest of said stock or securities, to be divided among them as provided in the statutes of the Commonwealth in such cases made and provided," means a division according to the statute of distributions. *Paine, petitioner*, 242.

See ESTATES OF PERSONS DECEASED, 3, 4; LIFE ESTATE; PUBLIC CHARITY; TAX, 1, 2; TRUST AND TRUSTEE, 4, 5; WILL.

## DISCHARGE.

See ACTION, 1.

## DISCONTINUANCE.

See JUDGMENT.

## DISCOVERY.

A bill for discovery of evidence to be used in defence of an action does not ordinarily lie against a person not a party to that action, and whose only relation to it is that of a witness. *Kelly* v. *Morrison*, 531.

## DISTRIBUTION.

A decree of distribution can be revised after the executor has distributed the estate as ordered so as to enable one, who is entitled to share in the estate but who has been by mistake omitted in the decree of distribution and who is not chargeable with laches, to recover his share from those to whom the estate has been distributed. *Harris* v. *Starkey*, 445.

See DEVISE AND LEGACY, 3.

## DIVORCE.

1. Assuming that a petition to set aside a decree of divorce for adultery of the petitioner, brought against the executor of the petitioner's husband, ever could be maintained on the ground of the suppression of evidence by the fraud and collusion of the husband with the petitioner, if her collusion

Digitized by Google

is caused by duress, threats, violence, and pecuniary temptation, her unreasonable delay in bringing the petition puts an end to her rights. *Brigham, petitioner*, 223.

2. The statute of South Dakota requiring a libellant to reside in the Territory for ninety days before beginning proceedings for divorce requires domicil and not merely bodily presence. *Quære*, what would be the effect in other States of a decree under a statute substituting bodily presence for domicil. *Andrews* v. *Andrews*, 92.
3. A South Dakota decree of divorce may be held void under Pub. Sts. c. 146, § 41, in a collateral proceeding in this State, upon a finding here that the parties were not domiciled in South Dakota, although the court granting the divorce found the other way and the libellee had appeared. The libellee in the divorce proceedings had withdrawn and the finding was on ex parte evidence. *Ibid.*
4. A libellee in divorce who withdraws her appearance for money is not estopped subsequently to deny the validity of the divorce as against a second wife in collateral proceedings. *Ibid.*

DOMICIL.

See DIVORCE, 2, 3; RESIDENCE.

DUE CARE.

See CARRIER, 1; EMPLOYERS' LIABILITY ACT, 3; EVIDENCE, 25; NEGLIGENCE, 1, 2, 4–8; TRIAL, 9.

DURESS.

See DIVORCE, 1; INJUNCTION.

EASEMENT.

See EQUITY, 6.

ELECTION.

1. In this case, which was an action to recover money fraudulently converted by the defendant to his own use, it having been intrusted to him for the purchase of certain shares of stock, it cannot be fairly held that the acceptance of a certain sum of money, it being the equivalent of the dividend then due upon the shares, sent by the defendant in a letter, and of certain similar subsequent instalments, and the acceptance of two agreements signed by the defendant, one whereby he promised to pay the plaintiff the amount due with interest, and the other whereby he agreed to deliver to the plaintiff or his legal representatives the shares of stock in question, on condition that for each share so delivered a certain sum

Digitized by Google

should be indorsed on a note of even date, the plaintiff not being compelled to accept the stock but having the right to demand payment in money, were an election by the plaintiff to hold the defendant liable to make restitution by transferring to the plaintiff the shares, with the dividends thereon, until the stock should be handed to him, and to relinquish his right to demand from the defendant the amount due, with interest, until repaid. *Tallant* v. *Stedman*, 460.

2. By proving in insolvency proceedings a claim created by fraud, the creditor does not lose his right to sue the insolvent under Pub. Sts. c. 157, § 84, and even if his testimony is taken literally to mean that, in making his proof in insolvency, he went on a note and not on the fraud, he is not thereby, as matter of law, to be taken to have waived the fraud. *Ibid.*

ELECTRICITY.

See NEGLIGENCE, 4–6.

EMINENT DOMAIN.

1. A petitioner to recover damages for the taking by the respondent city under the St. of 1888, c. 309, of his dam, water rights, and other real estate, having conveyed his dam to the respondent, which the respondent may at any time take down, has lost the means of flowing the lands above, and the taking has done him no injury. *Small* v. *Brockton*, 15.

2. One whose water rights are taken under St. 1897, c. 338, incorporating the Groton Water Company, cannot apply directly to the Superior Court for a jury without first making application to the county commissioners for an assessment of damages. *Danforth* v. *Groton Water Co.* 118.

3. The Framingham Water Company has no right under the St. of 1884, c. 271, incorporating it, and by the taking, as against the Old Colony Railroad Company, to all the waters of Farm Pond and Sudbury River within certain limits and to determine the question of necessity, but only has the right to so much of them as is necessary for the purposes specified in § 1 of the statute. *Framingham Water Co.* v. *Old Colony Railroad*, 404.

4. The Old Colony Railroad Company has the right to pump water from Farm Pond for the necessary use of its railroad, so far as that use does not interfere with the use of the same by the Framingham Water Company for supplying the town of Framingham with water under the St. of 1884, c. 271. Whether that company would have the right to use the water so as to interfere with the corporate purposes of the railroad company, *quære*. *Ibid.*

5. Upon the trial of a petition for the assessment of damages for the taking for a public purpose of a leasehold estate in property used for greenhouses, evidence of the value of the plants, flowers, and potted soil of the petitioner on the premises, and of the amount of business done by him, is admissible only as bearing upon the question of the capacity of the real estate for use, the view of the premises taken by the jury not enabling them to see the property as it was at the time of taking, as the greenhouses had been



Digitized by Google

taken down and a part of the land had been filled up. *Pegler* v. *Hyde Park*, 101.

6. On a petition for the assessment of damages for the taking of property for a public purpose, the respondent cannot set off against the petitioner's claim for damages the value of the petitioner's occupation of the property for a time after the taking. *Ibid.*

7. If, in the case of the taking of an estate for a public purpose, the landlord is only paid his damages as reversioner, the lessee is entitled to receive compensation for the injury to his interest; and the cancellation of the lease is not to be considered in estimating his damages; and under the statute, which applies to the case, interest does not begin to run until the land is entered upon for the purpose of construction. *Ibid.*

8. On a petition to recover damages for the taking of a leasehold estate by the Boston Terminal Company, it appeared that on January 5, 1897, the respondent, being already the owner by purchase of the reversion of the land in question, filed a location under the authority of St. 1896, c. 516, purporting to take in fee (by the right of eminent domain) a tract of land including the premises, and that three days later, on January 8, it served a notice on the petitioner that, whereas the lease was terminable by the lessor upon such a taking, it elected to terminate it. The lease provided that "in case the premises, or any part thereof, shall be taken for any street or other public use, or by the action of the city or other authorities, . . . then this lease and the term demised shall terminate at the election of the lessors or those having their estate in the premises." *Held*, that the meaning of the lease was that the landlord could end the right of the tenant to share in the damages; that the taking was within the terms of the proviso; that it was not a breach of the covenant for quiet enjoyment; and that the fact that it was done through the landlord made no difference. *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.* 115.

9. At the trial of a petition for the assessment of damages to land of the petitioner from a change of grade of an adjacent public way, made under an order passed by the board of aldermen of the city of Boston in 1884, the judge properly refused to rule as requested by the respondent, that if any ways in the vicinity of the petitioner's land were laid out by the respondent under St. 1894, c. 439, the value of the land taken therefor, and any damages caused to the remaining land of the petitioner by the laying out of such ways at the grades at which they were laid out, could then be recovered by the owner of the land. *Dana* v. *Boston*, 97.

See CONSTITUTIONAL LAW, 5; EVIDENCE, 7–10; HIGHWAY, 4.

## EMPLOYERS' LIABILITY ACT.

1. A person stationed in the tower in a railroad yard, whose duty it is to move the switches upon receiving signals and orders from others in the yard, is in "charge or control" of a switch, within the meaning of St. 1887, c. 270, § 1, cl. 3. *Welch* v. *New York, New Haven, & Hartford Railroad*, 393.

Digitized by Google

2. If a switchman in the employ of a railroad corporation, engaged in shifting cars in the railroad yard, gives the man stationed in the tower the signal for a certain track by holding up a lantern and also shouting the number of that track, and the latter throws up his hand as a signal that he heard and understood him, and then so turns the switch that the cars are sent upon another track and injure the switchman, in an action for the injury there is evidence of negligence on the part of the tower man to be submitted to the jury. *Welch* v. *New York, New Haven, & Hartford Railroad*, 393.

3. In this case, which was an action under the employers' liability act, St. 1887, c. 270, as amended by St. 1892, c. 260, for causing the death of the plaintiff's intestate, there was evidence of due care on the part of the intestate which should have been submitted to the jury. *Ibid.*

4. The mother of an employee of a railroad corporation who had always lived with her and given her all his wages, which she used in the support of her family, although she also received from her husband and two daughters the wages earned by them, which she used in the same way, may be found to have been dependent on her son for support, within the meaning of St. 1887, c. 270, as amended by St. 1892, c. 260. *Ibid.*

5. A statute cannot impose duties upon a non-resident alien, but it may confer rights upon him. The St. of 1887, c. 270, § 2, confers a right to sue upon the next of kin who is a non-resident alien. *Mulhall* v. *Fallon*, 266.

6. A plaintiff in an action under St. 1887, c. 270, § 2, for causing the death of her son, properly may be asked to what extent, if at all, she was dependent upon him for support. *Ibid.*

7. Partial dependence for the necessaries of life is enough under St. 1887, c. 270, § 2. *Ibid.*

8. In an action for personal injuries under the employers' liability act, St. 1887, c. 270, evidence which, though contradictory, justifies a finding that T. was a person whose principal duty was that of a superintendent; that as such superintendent he gave to the plaintiff the order to start up the machine; that at the time of the order he had reason to know that the plaintiff might understand it as a command to try to ascertain by resuming his work whether the machine was all right; that he so understood the order and was justified in so understanding; that, acting thereon, he attempted to resume work; that while so doing and in the exercise of due care, by reason of the violent and unusual shaking of the machine, his hands were thrown from their usual place and the presser came down upon his fingers and crushed them, and that under the circumstances the order was negligent, makes a case for the plaintiff. *Eaves* v. *Atlantic Novelty Manuf. Co.* 369.

9. It is a defence to an action against a town, under the employers' liability act, St. 1887, c. 270, for the conscious suffering and death of the plaintiff's intestate, that the work in which the intestate was engaged was a public one under the direction of the superintendent of streets, who was a public officer engaged in the performance of a public duty; and the circumstances of this case do not justify the plaintiff's contention that the superintendent

Digitized by Google

was engaged as a servant of the town in matters relating to its private benefit and not to its public duty. *Murphy* v. *Needham*, 422.

See ACTION, 4.

## EQUITY.

### I. *Jurisdiction and General Principles.*

1. A beneficiary association admitting its liability to pay the sum named in a certificate of insurance to the persons entitled to it, and the only question being as to who are such persons, a bill in equity will lie to determine that question, circuity of action being thus avoided. *Pease* v. *Royal Society of Good Fellows*, 506.
2. Equity will not enforce, by means of the doctrine of equitable estoppel, a contract between husband and wife in the case of a promissory note signed by her, payable to his order and indorsed by him; and in this bill in equity there are no sufficient allegations to constitute the ground of an estoppel. *National Granite Bank* v. *Tyndale*, 547.
3. A party cannot be relieved in equity, by reason of an estoppel, any more than at law from the effects of a positive rule of law. *Ibid.*
4. A bill in equity alleged that the plaintiff's husband had taken out a benefit certificate in a fraternal beneficiary society, in which the children of the husband by a former marriage were named as beneficiaries; that the husband promised the plaintiff to transfer the certificate to her; that subsequently, relying on the assurance that it had been transferred, she paid assessments on the certificate, from September 1, 1892, to January 30, 1899, to the amount of $330, and also at different times from June 5, 1892, to January 30, 1899, paid to him or on his account money to the amount of $5,000; that, under the laws of the society, the death benefit could have been made payable to her, and that the failure and neglect of her husband to make the certificate payable to her, and the statement that it was so payable, and the inducing her thereby to pay over to him and for his benefit the sum of $5,000, and to pay his dues and assessments, and to keep up his membership by making said payments, was a fraud upon her. The prayer was that the death benefit should be made payable to her, and that the society should pay to her the benefit fund, or that it might be decreed that the society or the other defendants should repay to her out of the fund the amount of assessments she had paid. *Held*, that the bill could not be maintained. *Clark* v. *Royal Arcanum*, 468.

See ASSIGNMENT, 3; BENEFICIARY ASSOCIATION, 2; CONTRACT, 1, 2; CREDITORS; EVIDENCE, 16; INJUNCTION; LIMITATIONS, STATUTE OF, 2; PARTNERSHIP, 1, 2; WAY, 2.

### II. *Pleading and Practice.*

5. A bill in equity to establish a resulting trust in land and a petition at law for the partition of the same are not inconsistent. *Weeks* v. *Edwards*, 453.
6. A bill in equity to restrain the obstruction of a right of way over a railroad, and the proceedings thereon, which leave open the question whether

Digitized by Google

the defendant has a right to maintain gates at the crossing, cannot be pleaded in bar of a bill in equity to restrain the maintenance of gates subsequently erected at such crossing. *Hamlin* v. *New York, New Haven, & Hartford Railroad*, 514.

7. Although a verdict rendered upon issues of fact submitted to a jury in a suit in equity, if not set aside, is regarded as settling the facts so put in issue and is conclusive upon those issues, yet a justice who afterwards hears the case may, upon the evidence before him, find other material facts not inconsistent with the findings of the jury. *Dudley* v. *Dudley*, 34.

8. Two bills in equity were brought, one by a water company against a railroad company for an injunction to restrain it from using any of the waters of a certain pond, and the other by the railroad company against the water company to compel it to specifically perform its agreement as to supplying the railroad company with water from the pond. In the first case this court decided that the railroad company had the right to pump water from the pond for its own use. In the second case the railroad company did not contend that if it had the right so to pump water it could maintain the bill for specific performance. *Held*, that there was no occasion, by the admission of the railroad company, to consider the matter of specific performance further. *Framingham Water Co.* v. *Old Colony Railroad*, 404.

9. Two bills in equity were brought, one by a water company against a railroad company for an injunction to restrain it from using any of the waters of a certain pond, and the other by the railroad company against the water company to compel it to specifically perform its agreement as to supplying the railroad company with water from the pond, and to restrain it from prosecuting two actions at law already brought against the railroad company, one to recover for all the water which the water company had furnished the railroad company from its pumping station, and the other alleging that the railroad company had taken water from the pond without its consent, claiming damages. *Held*, at the trial of the second bill in equity, that as to the two actions at law, the first depended upon whether the contract was made, and this could more properly be determined in the first action; that the second action at law would seem to be governed by what this court had decided in the first bill in equity as to the right of the railroad company to pump water from the pond for the necessary use of its railroad, and that an injunction should not issue to restrain the further prosecution of that action, if the water company should see fit to continue to go on with it. *Ibid.*

See APPEAL, 1; DISCOVERY; EQUITY, 2; LIMITATIONS, STATUTE OF, 1; SUPERIOR COURT, 1.

## ESTATES OF PERSONS DECEASED.

1. A promissory note secured by mortgage upon real and personal estate, which matures more than two years after the giving of bond by the administrator of the deceased maker, is a debt for which provision is made by Pub. Sts. c. 136, § 13, and therefore is not within the provisions of

Digitized by Google

§§ 26 and 27, whether the personal estate be sufficient or not to pay it. *Bassett* v. *Drew*, 141.

2. P., the maker of a promissory note, gave E. for his indorsement thereof a promissory note as collateral security, which was to apply to all renewals of the original note. The original note was three times renewed, and before the last renewed note fell due P. died. *Held*, that although the bank which discounted this note had proved it against the insolvent estate of P., E. could also prove his claim on the note given him by P. *Emerson* v. *Paine*, 391.

3. By the eleventh clause of the third codicil to his will the testator revoked "the residuary clauses in my will and codicils and in lieu thereof" gave the residue remaining after the payment of specific legacies, provided for in the will and codicils, one third to a nephew, one third to another nephew, one sixth to still another nephew, and one sixth to a niece. After referring to the will and the first and second codicils, the third codicil ratified them save as "changed by this instrument." The will and second codicil contained residuary clauses which were revoked by the eleventh clause of the third codicil; but, after providing in the second codicil that in case of the death of certain legatees before him the legacies given to them by will should be paid to their legal representatives, the testator proceeded, "I further direct that if any of the other legatees named in my will or codicils thereto shall die before my decease, the legacies therein given shall lapse, and the amount thereof shall be included in the residue of my estate." *Held*, the niece having died without issue before the testator, that the gift was not to the persons named as a class, but that the share which she would have taken had she survived the testator passed as intestate property. *Lynan* v. *Coolidge*, 7.

4. A testator gave his sister, R., the residue with power "to sell and dispose of so much . . . as will insure her a comfortable living," with "full control" and "with full power to deed to her grantees, their heirs and assigns forever," and gave at her decease the balance to the town of N., in trust, the income to be used "for the preservation of a monument which my executor is hereby authorized to erect at my grave, and for the care and beautifying of my lot in the cemetery. . . . The town shall not expend a greater sum than four per cent per annum, deeming that as large an amount as the town ought to pay." The residue consisted of real estate. R. survived the testator and left at the time of her decease a will, in which she gave the residue of her estate to A. and B. *Held*, on a writ of entry by A. and B. against the town of N., that R. took under her brother's will a life estate; that the bequest for the care of the monument and the cemetery lot was a good perpetual trust; that the fact that the town had ceased to own the cemetery at R.'s death, or that the testator never owned a lot in the cemetery, was immaterial; that it made no difference that the property devised consisted of real estate, and that the direction that not more than four per cent per annum should be expended by the town, referred to an amount not exceeding four per cent on the principal. *Morse* v. *Natick*, 510.

See DEVISE AND LEGACY; TRUST AND TRUSTEE, 4, 5; WILL.

Digitized by Google

## ESTOPPEL.

See DIVORCE, 4; EQUITY, 2, 3, 6; RESIDENCE, 3.

## EVICTION.

See LANDLORD AND TENANT, 1.

## EVIDENCE.

1. The grantee of two adjoining lots of land, who, after the purchase of the second lot, builds a permanent fence westerly of the division line between them, extends a portion of a building on the first lot upon the second lot east of the fence, concretes the space between that building and the fence, and subsequently erects a building on the second lot west of the fence, may testify at the trial of a petition to enforce a lien against the second lot which describes the lot as it was described in the deed to him, that it was his intention by the erection of the fence to establish a new permanent division line between the lots. *Pollock* v. *Morrison*, 83.
2. In an action for libel against a member of an association, who set in motion the machinery of the association which contemplated that a person who did not pay his debts could not buy of members of the association except by paying cash before delivery, if the answer avers that the alleged libellous matter was true, and was published without malice, the defendant may testify to his purpose in forming and carrying on the association. *Hartnett* v. *Goddard*, 326.
3. If the plaintiff, during his examination of the defendant as a witness, opens the matter of what the latter's intention was in doing the act complained of, which consisted in setting in motion the machinery of an association of which he was a member, his counsel properly is allowed, in the discretion of the judge, to ask him whether he intended that the members of the association should do anything more than was provided by its by-laws. *Ibid.*
4. In an action for libel against a member of an association, who set in motion the machinery of the association which contemplated that a person who did not pay his debts could not buy of members of the association except by paying cash before delivery, if the secretary of the association, who is called as a witness for the plaintiff, identifies several circulars and letters referred to in the declaration, as well as others relating to the process of dealing with the plaintiff through the association, the defendant properly is permitted to examine him upon the practice of the association in regard to arbitration in case of differences, though no evidence has been put in that either party has requested or submitted to arbitration in regard to such differences. *Ibid.*
5. In an action for a malicious prosecution of a former suit brought by the defendant against the plaintiff, it is competent to prove what was said by the defendant in the original action and by his wife to the officer who made the attachment, as to the wife's ownership of the property attached,

Digitized by Google

this being communicated to the plaintiff. It was notice to the plaintiff in that action that the property belonged to the wife, and his answer that "they would not stay without their furniture; they would come around and settle," was admissible to show malice on his part. *Walkup* v. *Pickering*, 174.

6. At the trial of an action against a foreign corporation for damages for personal injuries sustained by the plaintiff while participating in a sport at certain amusement grounds alleged to be operated and controlled by the defendant, a certified copy of an application by it for a license from the board of aldermen for the entertainments at such amusement grounds, a certified copy of the certificate of the defendant under St. 1884, c. 330, which referred to such amusement grounds as its usual place of business, both made before the action was commenced, and a certified copy of a return of the defendant under St. 1891, c. 341, made after action brought, giving such amusement grounds as its post-office address, all purporting to be signed either by the defendant or by its officers, are competent in connection with the fact that the defendant's name was painted over the entrance to the grounds, and other evidence for the purpose of showing that it operated and controlled such grounds. *Smith* v. *Paul Boyton Co.* 217.

7. At the hearing upon a petition for a writ of certiorari to quash the assessment of betterments for the laying out of a public way under St. 1893, c. 339, and St. 1894, c. 439, which did not confine the assessment to abutters, evidence that the value of estates near the end of the way was increased by having a shorter and pleasanter route to important points, and was increased much more than that of remoter estates, is inadmissible if the omission to assess such estates was not due to a mistake of law, or if the alleged benefits were not special and peculiar within the meaning of the statutes. *Lincoln* v. *Street Commissioners*, 210.

8. At the trial of a petition for the assessment of damages to land from a change of grade of an adjacent public way, made under an order passed by the board of aldermen of the city of Boston in 1884, the petitioner was properly allowed to introduce in evidence the St. 1894, c. 439, by which the respondent was directed to lay out certain ways in a territory including the petitioner's land in accordance with a certain plan prepared in 1894, and also the plan referred to in the statute, for the purpose of aiding the jury in understanding the evidence introduced when they viewed the land, and of showing the changes made after the date of the order, and of presenting a desirable scheme for the use and improvement of the petitioner's land. *Dana* v. *Boston*, 97.

9. At the trial of a petition for the assessment of damages to land from a change of grade of an adjacent public way, made under an order passed by the board of aldermen of the city of Boston in 1884, the judge properly excluded evidence offered by the respondent that the petitioner, in accordance with an order of the board of health of Boston, acting under St. 1893, c. 342, had filled the land to a grade much below the grade to which he would have been obliged to fill in order to use his land had not the grade of the way been raised. *Ibid.*

Digitized by Google

10. At the trial of a petition by a railroad company for the assessment of damages for the taking of vacant land of the respondent, and for damage to his other land, the respondent having introduced without objection testimony of the price paid at a recent sale for a lot of land with a dwelling-house and stable upon it, situated near the land taken, on the opposite side of the street (although if objection had been made the evidence probably would have been excluded), he may be permitted to point out the difference between the two estates, for the purpose of giving the evidence its true value, if it can be done without embarrassing the case with collateral issues; but the opinion of experts cannot be received in regard to the effect, upon the value of the estate sold, of features wherein it differs from the estate whose value is to be ascertained, or their opinion in regard to any elements of value which enter into the price, for the purpose of aiding in applying the evidence of the sale to the issue before the jury. *Old Colony Railroad* v. *F. P. Robinson Co.* 387.

11. In an action for libel, in publishing the statement that a theatrical performance was indecent, evidence that the costumes worn by the women who danced on the stage at the performance were similar in style to those usually worn by women dancing on the stage at public performances, is properly excluded. *Fay* v. *Harrington*, 270.

12. In the case of interrogatories propounded to a physician as to P.'s mental condition, his ability to manage his affairs, and whether F., who was in close personal relations with P., made any statement to the deponent as to P.'s "mental competence to manage his own affairs, and if so, what?" answers to the effect that P. was weak and depressed and appeared to be under the influence of F.; that he was unfit to manage a business of any kind, and that F. said that P. was not competent to manage his business, and that, as he had a good deal of money, he (F.) felt that he wanted to help him along, and so took him under his protection, are clearly competent, the answer as to the statement of F. being admitted in contradiction of F., who had previously been asked upon cross-examination as to P.'s mental condition. *Cooke* v. *Plaisted*, 374.

13. If, in an action against a town for personal injuries, the subject of inquiry is the nature of the duty or service in which the superintendent of streets was engaged at the time of the accident, questions which have no tendency, or at least a very remote one, to throw light on that matter, are rightly excluded. *Murphy* v. *Needham*, 422.

14. In an action against a railroad corporation for causing the death of a switchman in its employ while engaged in shifting cars in the railroad yard, owing to the negligence of the man stationed in the tower in so turning the switch as to send a train upon a track other than that for which the signal was given, evidence is competent to show that the train was coming much faster than the usual and ordinary rate of speed for cars which were being shifted at that place. *Welch* v. *New York, New Haven, & Hartford Railroad*, 393.

15. The opinion of a witness, not an expert, as to how far the voice of a switchman, who had shouted a direction to the man in the tower while engaged in shifting cars in a railroad yard on a stormy night, could be

Digitized by Google

heard in the storm, is properly excluded in an action against the railroad corporation for causing the death of a switchman. *Welch* v. *New York, New Haven, & Hartford Railroad*, 393.

16. Declarations of a grantor as to his purpose in inserting a condition in a deed made just after the delivery thereof, are inadmissible at the trial of a bill in equity to restrain the owner from a violation of the condition. *Clapp* v. *Wilder*, 382.

17. In actions tried together against the maker and the indorsers of several promissory notes, there being abundant evidence as against most of the defendants of the genuineness of the notes, the notes are rightly admitted in evidence. *Produce Exchange Trust Co.* v. *Bieberbach*, 577.

18. A by-law of a corporation authorizing promissory notes to be signed in a certain manner is rightly excluded in an action upon a note made by the corporation, no evidence being offered tending to show actual knowledge of such by-law by the plaintiff, who relies wholly upon proof that the corporation has recognized and paid notes signed like that in suit. *Ibid.*

19. In this case, which consisted of three actions tried together upon promissory notes contended to have been received by the plaintiff from the bank which discounted them before maturity, the bill of exceptions does not show that the conversations between a witness for the defendants and the cashier of the bank, stated therein as conversations tending to show a fraudulent issuance of the notes and knowledge of such fraud by the cashier, were excluded wrongly. *Ibid.*

20. Entries in the books of a bank which has discounted certain promissory notes, and the testimony of the clerks who kept the books as to facts within their personal knowledge, showing that the discounts went to the credit of the maker of the notes or his agent, whose evidence is thus in part contradicted, are competent and rightly admitted in an action upon the notes. *Ibid.*

21. The act of a foreman in turning a time book in to a superintendent as the record of the time worked by the men in his gang amounts to a representation that they have worked the time therein set down, and as such evidence of the entries is admissible to contradict him; and whether the entries were actually made by him or not is immaterial. *Healey* v. *Wellesley & Boston Street Railway*, 440.

22. In an action for personal injuries occasioned to the plaintiff while passing on the sidewalk by the fall of bricks from a chimney on the house of the defendant, which chimney a contractor was employed in repairing, a circular handed to the defendant by the contractor when the contract was made representing his business competency and experience, and including a cut of the staging used by him, is rightly excluded, his competency, even if material, not being in dispute, and the kind of staging he advertised to use being immaterial; and the exclusion of questions with reference to prior ailments of the plaintiff is within the discretion of the court. *Boomer* v. *Wilbur*, 482.

23. On the issue, in an action to recover money fraudulently converted by the defendant to his own use, whether there was an agreement between the plaintiff and the defendant that certain promises of the defendant

Digitized by Google

were taken in satisfaction of the plaintiff's claim against the defendant for his fraud, it is not competent to put in evidence the undisclosed intention of the plaintiff not to accept the written promises of the defendant in satisfaction of his original claim. *Tallant* v. *Stedman*, 460.

24. A written paper signed before the time of the trial by a person called as a witness and under cross-examination may be put in evidence to show that he had made statements different from his testimony. *Barker* v. *Lawrence Manuf. Co.* 203.

25. In an action for personal injuries occasioned to the plaintiff by falling through a hole in the floor of the room in which he was employed, evidence tending to show that the plaintiff had said, soon after the accident, that he knew that the hole was there, he having testified that he did not know that the floor was taken up at that place, is admissible both as a contradiction and as an admission of his knowledge of the existence of the opening, that knowledge being itself material upon the question whether he was careful or negligent. *Ibid.*

26. It is proper to allow evidence to show, if such a matter is in dispute, how far, if at all, the conditions due to temporary causes at the time of the view by the jury differed from those which existed at the time of the accident. *Ibid.*

See ABORTION; APPEAL, 1; ASSIGNMENT, 3; ATTORNEY AND CLIENT, 6; BROKER, 1, 2; CARRIER, 1; COLLATERAL SECURITY, 3; CONTRACT, 1; CONVERSION, 1, 3; DISCOVERY; EMINENT DOMAIN, 5, 9; EMPLOYERS' LIABILITY ACT, 6, 8; EQUITY, 7; EXCEPTIONS, 4–6; EXPERT; INDORSEMENT, 2; INTEREST, 1; LIBEL, 1, 4; LORD'S DAY, 2; NEGLIGENCE, 4, 6; PROMISSORY NOTE, 4, 5, 7, 10; RESIDENCE, 1, 3; SLANDER; TRADEMARK, 3; TRIAL, 1, 2, 4–8, 10–13; WILL, 2–4; WITNESS; WRIT OF ERROR, 2.

## EXCEPTION.

See DEED, 2.

## EXCEPTIONS.

1. If there is nothing on the record which warrants the suggestion contained in an exception, the exception is not before the court. *Smith* v. *Butler*, 38.
2. There is no ground of exception to the refusal to give instructions, if, so far as they are founded on correct principles of law, and are applicable to the facts, they are covered by the charge. *Hopkins* v. *O'Leary*, 258.
3. No exception lies to the refusal to give particular instructions to the jury upon retiring to amend their written verdict so as to conform to the finding which they have reported. *Produce Exchange Trust Co.* v. *Bieberbach*, 577.
4. If no exception is taken to the admission of testimony, the question whether it was admissible or not is not open. *Walkup* v. *Pickering*, 174.
5. Counsel cannot argue upon his brief the question of the competency of an auditor's report, if the exceptions do not show that any objection was made to its admission or exception taken. *Cooke* v. *Plaisted*, 374.

Digitized by Google

6. If no exception to the course of the presiding judge with respect to a plan is shown by the bill of exceptions to have been taken, and before the plan was allowed to go to the jury it was sworn to by the engineer who made it, no error in dealing with the plan is shown. *Barker* v. *Lawrence Manuf. Co.* 203.

7. A person cannot be allowed to make a contention in this court which the bill of exceptions does not show that he made at the trial. *Ibid.*

See EVIDENCE, 19; MILK; TRIAL, 5–8.

EXECUTION.

See SET-OFF, 2.

EXECUTOR.

See DISTRIBUTION; RESIDENCE, 1, 3; TAX, 8.

EXPERT.

If the difficulty with a question put to an expert is that the ability of the witness and his own opinion of it are immaterial to the questions upon trial, the question is rightly excluded. *Arnold* v. *Eastman Freight Car Heater Co.* 135.

See EVIDENCE, 10, 15; TRIAL, 5, 6, 8.

FEE.

See INSURANCE, 2.

FENCE.

See EVIDENCE, 1; WAY, 1.

FIRE INSURANCE.

See INSURANCE, 2.

FLOWAGE.

See EMINENT DOMAIN, 1.

FORECLOSURE.

See ATTORNEY AND CLIENT, 6; MORTGAGE; SPECIFIC PERFORMANCE.

FOREIGN CORPORATION.

1. Stockholders in corporations organized under the laws of Kansas are liable severally, and not jointly, to the judgment creditors of the corpora-

Digitized by Google

tion who pursue the remedy provided by Gen. Sts. of Kansas of 1889, par. 1192. This liability is transitory, and may be enforced in any court of general jurisdiction in a State where personal service can be made upon a stockholder; and the failure of such a creditor to recover judgment against a resident stockholder in this Commonwealth, and to have the execution returned unsatisfied here, is no bar to an action on the judgment recovered in Kansas. *Broadway National Bank* v. *Baker*, 294.

2. In this case, which was an action against a stockholder in a corporation organized under the laws of Kansas, upon a judgment recovered against the corporation there, the statute of limitations of that State is not a bar. *Ibid.*

3. A stockholder in a corporation organized under the laws of Kansas, who holds claims against the corporation, may, in accordance with the law in that State, avail himself of the same as an equitable defence to an action against him here upon a judgment recovered against the corporation there; but although by the law of that State he also may be allowed to set off the amount paid by him in good faith for claims purchased after the insolvency of the corporation, if such a claim is one owned originally by his wife, he cannot set it off in the absence of evidence that the arrangement was such a purchase in good faith or such a payment as entitles him to use the claim as an equitable defence to this action. *Ibid.*

See BENEFICIARY ASSOCIATION, 2; EVIDENCE, 6; JOINT STOCK COMPANIES; TRIAL, 10, 11.

## FOREIGN LAWS.

See DIVORCE, 2, 3.

## FORGERY.

See PROMISSORY NOTE, 9.

## FRAUD.

See ASSIGNMENT, 2; CORPORATION, 1; DECLARATION; ELECTION; EQUITY, 4; EVIDENCE, 19, 23; PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 6, 9; TRUSTEE PROCESS, 3.

## FRAUDS, STATUTE OF.

The statute of frauds does not apply to an action by one indorser of a promissory note, after he has paid it, to recover contribution from his co-indorser, the indorsements being made with the understanding that they shall be joint and not several. *Weeks* v. *Parsons*, 570.

See CONTRACT, 2, 3, 6.

Digitized by Google

## GOODS SOLD AND DELIVERED.

See DECLARATION.

## GUARANTY.

1. A guaranty "of payment to R. of a dividend of 6% per annum on stock subscribed to this day in" a corporation named, does not run beyond the life of R., a reasonable time having elapsed. *Rotch* v. *French*, 1.
2. On April 29 the plaintiff corporation wrote to the defendant, who was the treasurer of the D. Co., "If he [the defendant] will give us his written guarantee to pay bills of one month upon the 15th of succeeding month, if not already paid by the company [D. Co.], we will accept it and extend credit to extent of $200." On May 1 the defendant answered, "As you have requested me to have me guarantee the payment of the D. Co.'s account by the middle of the month, I hereby agree to pay the *current* month's account of the D. Co. on the 15th of the following month, if not paid by them before." Several months later the plaintiff corporation having notified the defendant that the D. Co. had not responded, and having called upon the defendant to make good his guaranty, he did *not* deny, but in substance admitted, his liability. *Held*, that the guaranty was a continuing one. *Celluloid Co.* v. *Haines*, 415.

See CORPORATION, 7; PROMISSORY NOTE, 2, 3.

## HANDWRITING.

See PROMISSORY NOTE, 5, 8.

## HEIRS.

See DEED, 2; DEVISE AND LEGACY, 2.

## HIGHWAY.

1. A bicycle is not a carriage within the meaning of that term in the Pub. Sts. c. 52, § 1. *Richardson* v. *Danvers*, 413.
2. The use of a street car with the rear fender projecting does not constitute an obstruction of the highway. *Gargan* v. *West End Street Railway*, 106.
3. *It seems* that a shut-off box in the middle of a sidewalk much used for foot travel, projecting on one side an inch and a quarter above the surrounding gravel, constitutes a defect in the highway. *Redford* v. *Woburn*, 520.
4. If a city takes by right of eminent domain for a water basin land *in* a town within the limits of a highway which is at the same time discontinued, and contracts with the town to provide for the public a safe and convenient way for travel over or around the discontinued way until

Digitized by Google

the completion of a new way to be substituted therefor, which contract is ratified by statute, a person who, while travelling on the old way, which is continually in use by the public before the completion of the new way, no temporary way around the old way being constructed, is injured by a defect in the old way, may maintain an action against the city for his injury, and he is not bound to give the notice required by Pub. Sts. c. 52, § 19. *D'Amico* v. *Boston*, 599.

See BETTERMENTS; CERTIORARI; CONSTITUTIONAL LAW, 4; EMINENT DOMAIN, 9; EVIDENCE, 7–9, 13; NEGLIGENCE, 4–8; RAILROAD, 1.

## HUSBAND AND WIFE.

The court has power to make an order, under Pub. Sts. c. 147, § 33, for the separate support of a wife while living in the same house with her husband and performing some of the duties of a wife; and the statute is constitutional. *Bucknam* v. *Bucknam*, 229.

See ACTION, 2; DIVORCE; EQUITY, 2, 4; FOREIGN CORPORATION, 3.

## INCOME.

See JOINT STOCK COMPANIES; PUBLIC CHARITY, 1; TRUST AND TRUSTEE, 4, 5; WILL, 6.

## INDEMNITY.

See SAVINGS BANK, 4.

## INDICTMENT.

See ABORTION.

## INDORSEMENT.

1. If there is an understanding between the directors of a corporation that they shall indorse certain promissory notes for the benefit of the corporation, and it is also intended and understood that the indorsements are to be joint and not several, the indorsers are, as between themselves, co-sureties. It is not necessary that there shall be a contract in so many words to sign as co-sureties. *Weeks* v. *Parsons*, 570.

2. It may be shown by parol evidence that as between themselves the relation between successive indorsers of a promissory note is that of co-sureties. *Ibid.*

See APPEAL, 2; ESTATES OF PERSONS DECEASED, 2; EVIDENCE, 17; FRAUDS, STATUTE OF; PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 2, 5, 7–9; TRIAL, 3.

Digitized by Google

## INJUNCTION.

If the members of one labor union conspire to compel the members of another union of the same craft to join the former union, from which they have withdrawn, and to carry out their purpose threaten strikes and boycotts to induce the employers of the members of the latter union either to get them to ask for reinstatement in the former union, or, failing so to do, then to discharge them, although no acts of personal violence or of physical injury to property are committed, such conspiracy and the acts in pursuance of it are unlawful, and having caused, and being likely still further to cause, injury, equity will restrain the actors by injunction. HOLMES, C. J., dissenting. *Plant* v. *Woods*, 492.

See EQUITY, 6, 8, 9; EVIDENCE, 16; WAY, 2.

## INSANITY.

See EVIDENCE, 12.

## INSOLVENT DEBTOR

See ASSIGNMENT, 1; ATTORNEY AND CLIENT, 1, 2; DECLARATION; ELECTION, 2; ESTATES OF PERSONS DECEASED, 2; RECEIVER; TRUSTEE PROCESS, 3.

## INSTRUCTIONS.

See ATTORNEY AND CLIENT, 1, 2; EXCEPTIONS, 2, 3; LIEN; MECHANIC'S LIEN, 7; MILK; NEGLIGENCE, 3, 5; TRIAL, 5, 9; WITNESS, 1.

## INSURANCE.

1. In this case, which was an action by a widow against a life insurance company to recover a certain sum of money according to the terms of the policy issued by the defendant on the life of her husband, there was evidence of a waiver on the part of the defendant of the time limit in regard to the notice of the death of the insured, and the question was rightly submitted to the jury; and the words "such injuries alone," in the clause in which the company agrees to pay the widow "if living . . . the sum of $5,000, if the death of the certificate holder shall result from such injuries alone within ninety days from the date of said accident," refer to the kind of injury which furnishes the basis of indemnity, namely, bodily injury effected during the life of the certificate "through external, violent, and accidental means." *Moore* v. *Wildey Casualty Co.* 418.
2. A sale and conveyance of real estate "reserving, however, to myself during my life, the dwelling-house on said parcel, together with one acre of land surrounding said dwelling-house, but not including in said acre the land on which the barn stands," is not a breach of the condition of a

Digitized by Google

policy of insurance against loss by fire which contains clauses which provide that it shall be void if, without the consent of the defendant, "the situation, or circumstances affecting the risk, shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks," or "the said property shall be sold"; and the policy is valid as to the interest remaining in the insured at the time of the loss. *Clinton* v. *Norfolk Mutual Fire Ins. Co.* 486.

3. There is no waiver of performance of a condition in a policy of insurance against liability that "immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession of the insured in any way relating to such accident," even if there is evidence that the defendant company was informed of the fact that the plaintiff at about the time of the accident had certain knowledge, unless at least the defendant knew that it not merely was dispensing with a further report, but also was doing away with an already absolute defence. *National Construction Co.* v. *Travelers' Ins. Co.* 121.

INTENTION.

See EVIDENCE, 1–3, 23; LIBEL, 4, 5; TRADE-MARK, 3.

INTEREST.

1. It is competent for parties to agree to pay interest on items in a running account, and such an agreement may be proved by evidence that there was a custom to that effect and that that custom was known to the parties. *Smith* v. *Butler*, 38.

2. If the interest charge, being the balance of interest charged on the items on each side of an account for the time in question, was in fact paid, and interest was in fact charged each year on a new principal which was not made up in any part of interest, it being a principal ascertained by deducting from the old principal the balance of the credits for that year left after deducting from them the interest balance charged, the contention that interest has been charged on interest, and more than six per cent interest has been charged in contravention of Pub. Sts. c. 77, § 3, there being no agreement in writing, is unsound and cannot avail. *Ibid.*

See COLLATERAL SECURITY, 2, 3; ELECTION, 1; EMINENT DOMAIN, 7.

INTERROGATORIES.

See EVIDENCE, 12; TRIAL, 12.

INTOXICATING LIQUORS.

1. A person who receives a license for the sale of intoxicating liquors must be assumed to have taken it upon the conditions of Pub. Sts. c. 100, and



Digitized by Google

the acts in amendment thereof, so far as respects his rights upon a revocation of the license; and there is no provision in any such statute authorizing a recovery in a case where the license not void in its inception is revoked on the ground that notices of the application were not posted on the premises described in the application as required by the sixth section of the statute. *McGinnis* v. *Medway*, 67.

2. Although the question whether licenses shall be granted in any city or town is determined by the vote of the inhabitants thereof, still the licensing board, whether a special commission or the mayor and aldermen or the selectmen, do not act as the agents of the city or town, but as public officers specially designated in that behalf, and, in the absence of any statute to the contrary, the city or town is not answerable for their acts as such officers. *Ibid.*

JOINT STOCK COMPANIES.

The surplus of a joint stock association organized under the laws of the State of New York, which was held and used under the requirements of the original articles of the association as a fund "to protect the shareholders and provide for losses," and the income of which it had divided among its shareholders from time to time, together with the earnings of the original capital, was distributed by vote of the managers to the shareholders by issuing bonds equal in amount to the capital stock of the company. The bonds contained no binding contract by anybody to pay anything. They merely gave the holder a contingent right to be paid out of the securities which previously had been held by the company, and which were transferred to the trustee with a proviso that they should be held by the new trustee as they had been held by the trustees of the company, for the security and indemnification of the shareholders against personal liability for the debts of the company; and payments were to be made to the bondholders only from such proceeds of the securities as should be applicable for the purpose, after provision was made for the payment of all other debts of the company. *Held*, that the bonds were like an issue of preferred stock, and that, as between tenant for life and remainderman, they were capital and not income. *D'Ooge* v. *Leeds*, 558.

JUDGE.

See APPEAL, 1; ATTORNEY AND CLIENT, 1, 2; EQUITY, 7; EVIDENCE, 3, 22; LIBEL, 2-4; TRIAL, 5, 8; TRUSTEE PROCESS, 2; WILL, 2; WRIT OF ERROR, 2.

JUDGMENT.

Taking judgment against less than all of the defendants in an action of tort is a discontinuance as to the others. *Munroe* v. *Carlisle*, 199.

See FOREIGN CORPORATION; JURISDICTION; LIEN; SET-OFF, 2; SUPERIOR COURT, 2; TRIAL, 10.

Digitized by Google

## JURISDICTION.

1. An attachment by the trustee process of a debt due to a non-resident defendant from a resident debtor gives jurisdiction to render a judgment which will be valid everywhere as against the property attached, although the defendant has not been served with process. *Rothschild* v. *Knight*, 48.
2. The voluntary general appearance in a personal action of a non-resident defendant who has not been served with process gives jurisdiction to render a personal judgment against him. *Ibid.*

See RESIDENCE, 2.

## JURY.

See ABORTION; ATTORNEY AND CLIENT, 1, 2, 5; BROKER, 1, 2; EMINENT DOMAIN, 2, 5; EMPLOYERS' LIABILITY ACT, 2, 3; EQUITY, 7; EVIDENCE, 10, 26; EXCEPTIONS, 2, 3; INSURANCE, 1; LANDLORD AND TENANT, 1; LIBEL, 3, 4; MASTER AND SERVANT, 2–4; MECHANIC'S LIEN, 7; NEGLIGENCE, 3, 5, 7, 8; SLANDER, 2; TRIAL, 5, 9, 13.

## LABOR UNION.

See INJUNCTION.

## LACHES.

The doctrine of laches does not apply in an action at law in reference to which there is an express statute of limitations. *Broadway National Bank* v. *Baker*, 294.

See CERTIORARI; DISTRIBUTION; DIVORCE, 1; LIMITATIONS, STATUTE OF, 2.

## LANDLORD AND TENANT.

1. In an action for an eviction or an unlawful exclusion of the plaintiff from his rooms in a hotel, the question whether there was a real and substantial exclusion or merely a temporary holding of the keys incident to the care of the rooms until the plaintiff should return and give the defendant an opportunity to converse with him, is one of fact for the jury. *Faxon* v. *Jones*, 138.
2. The lessor of a building, which the lessee has covenanted in writing to keep and put in repair, is not liable to a person who, during the term and more than three years after the lessee has taken possession under the lease, while walking on the sidewalk in front of the building is injured by the fall of a piece of the capstone from one of the windows thereof. *Munroe* v. *Carlisle*, 199.

See ACTION, 3; EMINENT DOMAIN, 7, 8; SLANDER.

Digitized by Google

## LAW AND FACT.

See BETTERMENTS, 3; ELECTION, 2; LANDLORD AND TENANT, 1; LIBEL, 2, 3; MASTER AND SERVANT, 3, 4; MECHANIC'S LIEN, 8; NEGLIGENCE, 7, 8; SALE; WILL, 3; WRIT OF ERROR, 1.

## LEASE.

See CONSTITUTIONAL LAW, 5; EMINENT DOMAIN, 7, 8; LANDLORD AND TENANT, 2.

## LEGACY.

See DEVISE AND LEGACY.

## LIBEL.

1. An article in a newspaper, charging the proprietor of a theatre with discriminating unfairly against the Irish population in his business of giving entertainments to the public, is not actionable in the absence of any allegation or proof of special damage. *Fay* v. *Harrington*, 270.
2. Overruling a demurrer to a count in libel does not necessarily mean more than that the judge cannot say as matter of law that the words are not libellous. *Ibid.*
3. Where the real issue in an action for libel is whether the articles in a newspaper complained of are reasonable criticisms of the plaintiff's methods of conducting his business of giving entertainments to the public, the judge rightly refuses to rule that the articles are libellous unless they are true, and properly submits the whole question of the defendant's liability to the jury. *Ibid.*
4. If a newspaper reprints an article from another paper which has reprinted with comments an article in the first named paper, for the publication of which an action for libel is brought, the judge rightly refuses to rule that the defendant is liable for the reprint, which is not counted upon, but is put in evidence, and rightly leaves its effect as evidence of malice to the jury. *Ibid.*
5. The malice required by Pub. Sts. c. 167, § 80, to rebut the defence of truth in an action for libel is actual malevolence in motive. *Ibid.*

See EVIDENCE, 2–4, 11; SLANDER.

## LICENSE.

See COLLATERAL SECURITY, 1; CONTRACT, 5; INTOXICATING LIQUORS.

## LIEN.

At the trial of an action brought by an assignee in insolvency upon a judgment recovered by the insolvent, it appeared that the first publication of

Digitized by Google

notice was on June 8, 1898; and that two days later the insolvent's attorney, who had had charge of the case in which the judgment was recovered, took out a third execution for the amount remaining unpaid, namely, $293.77, and the next day collected $200, agreeing to receive that sum in full satisfaction, and surrendering the execution to the defendant. The jury were instructed that they should allow the defendant the fees and disbursements of the attorney in the former case, which the jury fixed at $50, but that they should not allow the residue of the payment, as the defendant had no right to settle with the attorney after June 8. The defendant did not contest his liability for the amount of the execution in excess of the settlement, but excepted to the refusal to allow him the full amount paid. *Held*, that the instruction was correct. *Bruce* v. *Anderson*, 161.

See CONVERSION, 1, 3; EVIDENCE, 1.

## LIFE ESTATE.

A life interest given by will which directs that "no income or principal shall in any case be assignable or alienable by anticipation or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his or her actual receipt thereof," does not pass to the life tenant's trustee in bankruptcy. *Munroe* v. *Dewey*, 184.

See ESTATES OF PERSONS DECEASED, 4; INSURANCE, 2; JOINT STOCK COMPANIES.

## LIFE INSURANCE.

See INSURANCE, 1.

## LIMITATIONS, STATUTE OF.

1. If the cause of action sued on was not barred by the statute of limitations when actions at law were originally brought, but it was barred when the motion to consolidate the actions and to convert them into a bill in equity was made, the plaintiff's claim against the defendants in the original actions at law is not barred, but his claim against those defendants, who were first made parties to the litigation by the filing of the bill in equity, is barred. *Smith* v. *Butler*, 38.
2. A suit in equity by a *cestui que trust* against a trustee for an account and for the transfer and payment of both principal and income, brought eighteen years after the transaction between them had been reduced to a mere chose in action, is barred by the statute of limitations. *Treadwell* v. *Treadwell*, 554.

See FOREIGN CORPORATION, 2; LACHES.

## LOAN.

See BROKER, 1, 2; COLLATERAL SECURITY; CONSTITUTIONAL LAW, 6.

Digitized by Google

## LORD'S DAY.

1. If one of the purposes for which a common victualler keeps open his restaurant on the Lord's day is the sale of cigars, the keeping of that place open for that purpose is unlawful under St. 1895, c. 434, § 2. *Commonwealth* v. *Graham*, 5.
2. While a sale made in good faith upon an application for tobacco to be used as a medicine may be within the following language of St. 1895, c. 434, § 2, relating to the observance of the Lord's day, "but nothing in this statute shall be held to prohibit . . . the retail sale of drugs and medicines," yet, there being no offer to show such a sale, evidence that the defendant sold the articles as drugs is rightly excluded. *Commonwealth* v. *Goldsmith*, 104.

## MALICE.

See LIBEL, 4, 5; SLANDER, 1.

## MALICIOUS PROSECUTION.

See EVIDENCE, 5; TRIAL, 7.

## MANDAMUS.

See CORPORATION, 6.

## MASTER AND SERVANT.

1. An employee, having accepted the responsibility of arranging and moving a staging from which he falls and is injured, cannot be heard to say that it was negligence in the defendant to clothe him with the responsibility. *Arnold* v. *Eastman Freight Car Heater Co.* 135.
2. At the trial of an action for personal injuries occasioned to the plaintiff by an explosion of dynamite in a trench in which he was working at shovelling and picking, there was evidence tending to show that a series of holes had been drilled in the rock which the defendant was excavating, and they had been charged with dynamite and exploded by a battery; that the dynamite in one of the holes failed to explode, and that a companion of the plaintiff, who was afterwards set to work there, struck it with his pick and caused an explosion; that the defendant knew, or ought to have known, that when a charge is set off the dynamite in one or more of the holes sometimes fails to explode, and the jury might have found that it was his duty carefully to inspect the holes, or cause them to be inspected, before setting laborers to work there shovelling and picking after a blast. There was evidence to warrant a finding that through the negligence of the defendant, or of some one representing him, no sufficient or proper inspection was made. The plaintiff testified that at half-past nine o'clock on the day of the accident, which occurred at about half-past two o'clock, the defendant told him to go to work in this place

Digitized by Google

and that everything was all right. He had good reason to believe that the place was safe, and he was in the exercise of due care. *Held*, that the evidence warranted a verdict for the plaintiff. *Hopkins* v. *O'Leary*, 258.

3. While the employee assumes the obvious risks of the business, he does not assume the risk from the failure of the employer, either personally or through a superintendent, to perform the ordinary duties of an employer in providing against unnecessary or concealed dangers in places in which laborers are set to work; and the jury are rightly permitted to pass upon the question whether the employer was negligent in this particular. *Ibid.*
4. Upon the evidence in this case, which was an action for personal injuries occasioned to the plaintiff while in the defendant's employ by a fall from a spliced ladder, caused by its breaking while he was standing thereon, the questions whether the accident was attributable to the use of the ladder as it was intended to be used, whether the defendant was negligent, and whether the plaintiff knew and appreciated the risk arising from the manner in which the ladder had been spliced, were questions of fact for the jury. *Jones* v. *Pacific Mills*, 354.

See ACTION, 4; EMPLOYERS' LIABILITY ACT; EVIDENCE, 14, 15, 21; INJUNCTION; INSURANCE, 3; PRINCIPAL AND AGENT, 1.

## MECHANIC'S LIEN.

1. A mechanic's lien cannot be maintained upon a building which has been erected by a city to be used as a schoolhouse. *Staples* v. *Somerville*, 237.
2. A petition to enforce a lien on buildings and land should be dismissed if the land is described therein in the language of the deed conveying it to the respondent and not according to different and permanent bounds established by the respondent after the conveyance; but the Superior Court may allow the petition to be so amended as to describe the land correctly and the lien to be thereupon established. *Pollock* v. *Morrison*, 83.
3. If an inaccuracy in the description of land in a petition to enforce a lien against buildings and land is amended, a similar inaccuracy in the statement filed in the registry of deeds, which cannot be amended, will be considered as within the provisions of Pub. Sts. c. 191, § 8, and not fatal. *Ibid.*
4. Work done by a mechanic under a contract substantially performed at an earlier date, although it is of small amount, will save his lien if it is done in good faith, for the purpose of completing the contract, and not merely for the purpose of saving the lien. *McLean* v. *Wiley*, 233.
5. At the trial of a petition to enforce a mechanic's lien the petitioner testified that at the request of the respondent he took from him certain notes for his accommodation and not in satisfaction of the debt, raised money upon them, and arranged, at the request of the respondent, to know where each note was, so that the respondent could pay it before it fell due. The notes were not credited in the account until they were paid, and some of them were outstanding in the hands of third persons when the statement of lien was filed, but all had been taken up by the petitioner before he filed

Digitized by Google

his petition, and at the trial were turned into court by him for cancellation. *Held*, that the judge properly refused to rule that the petitioner could not maintain a lien for such portion of his account as was included in the outstanding notes. *McLean* v. *Wiley*, 233.

6. A petitioner to enforce a lien on buildings and land whose statement, filed in the registry of deeds, and whose petition both recited that he ceased to perform labor and furnish materials on September 13, may, after his petition has been so amended as to include labor and materials furnished on September 15, be allowed to testify that the recital in the statement was a mistake, and that he furnished labor and materials on September 15. *Burrell* v. *Way*, 164.
7. At the trial of a petition to enforce a lien on buildings and land, in which the petitioner testified that he charged the respondent $6 per day for the labor of a plumber and his assistant to whom he was paying $2.83½ per day, and that such charge was the regular market price for such labor and was agreed to by the respondent, a request by the respondent to instruct the jury that such charge was sufficient to warrant a finding that the petitioner had wilfully and knowingly claimed more than was due him was properly refused. *Ibid.*
8. At the trial of a petition to enforce a lien on buildings and land, it appeared that the last material furnished by the petitioner, except certain piazza columns, was furnished September 30; that it did not appear that any time was fixed by the contract within which the columns were to be delivered, and their delivery was delayed by him until October 23 for the purpose of extending and preserving his lien; and that he filed his certificate of lien on October 29. *Held*, that the judge was not bound as matter of law to rule that the delivery of the columns on October 23 did not extend the time within which the statement must be filed. *Ibid.*
9. If a petition to enforce a lien on buildings and land, filed December 13, and the statement, filed in the registry of deeds, both recite that the petitioner ceased to furnish labor and materials on September 13, it is too late, after the allowance of an amendment of the petitioner, so as to include labor and materials furnished on September 15, to raise the question that the petition was not seasonably filed. *Ibid.*

See EVIDENCE, 1.

## MILK.

At the trial of a complaint under St. 1899, c. 223, relative to the standard quality of milk, it appeared that the information furnished to the defendant as to the result of the analysis of the milk was in substance that the milk inspector told the defendant that he would give him the result of the analysis of the samples if he would like it, and did so, telling him the percentages of total solids and of fat in the case of each sample; that afterwards the defendant came back to the inspector's office, and the inspector then told him that he "would give him the figures in writing if he wanted them, and he said he would like the figures of the analysis of the samples

Digitized by Google

that were below standard," and that the inspector wrote them down and caused the paper on which they were to be given to him. *Held*, that there was a sufficient compliance with St. 1899, c. 169, and that, the jury having been so instructed in substance, the defendant had no ground of exception. *Commonwealth* v. *McCance*, 292.

See COMPLAINT, 2, 3, 5.

MISTAKE.

See BETTERMENTS, 3; DISTRIBUTION; EVIDENCE, 7; MECHANIC'S LIEN, 6; MORTGAGE, 3.

MONEY HAD AND RECEIVED.

See ACTION, 2; CONTRACT, 6.

MORTGAGE.

1. It is no objection to the validity of a sale of land under a power in a mortgage, after several adjournments, that the adjournments were not advertised, if it does not appear that the failure so to advertise resulted in any sacrifice of the property or involved any injury to the owner of the equity of redemption. *Way* v. *Dyer*, 448.
2. The owner of the equity of redemption in land sold under a power in the mortgage, after several adjournments, has no standing, nineteen months after the sale, to object to its validity on the ground that the adjournments were not advertised, if they were all made at the request of the person who represented him and the title in all matters relating to the foreclosure, and who consented to the notices in the form in which they were given, and knew of the sale and made no objection to it. *Ibid.*
3. A mistake in an advertisement of a sale of land under a power in a mortgage, in overstating the amount due on a prior mortgage, cannot affect a purchaser, in good faith and for a valuable consideration after the foreclosure and without any actual or constructive knowledge of the error. *Ibid.*

See ASSIGNMENT, 2, 3; ATTORNEY AND CLIENT, 6; BROKER, 1, 2; CONTRACT, 1, 2, 6; ESTATES OF PERSONS DECEASED, 1; SPECIFIC PERFORMANCE; TRUST AND TRUSTEE, 1.

MOTION TO QUASH.

See COMPLAINT, 4, 5.

MUNICIPAL CORPORATION.

See ASSIGNMENT, 1; EMINENT DOMAIN, 1; HIGHWAY, 3, 4; INTOXICATING LIQUORS, 2; MECHANIC'S LIEN, 1; RECEIVER; TOWN.

Digitized by Google

## MUNICIPAL COURT.

See APPEAL, 2.

## NAME.

See CORPORATION, 2.

## NATIONAL BANK.

In an action by one national bank against another, both being members of a clearing-house association, to recover the amount of a promissory note included in the account in the clearing-house of the defendant bank against the plaintiff bank, at which it was payable, and returned by the plaintiff to the defendant after the close of business hours, if there is evidence of a universal custom among the members of the association, which choose to clear their notes through the clearing-house in place of presenting them for payment at the banks where they are payable, that if notes included in the clearing-house settlement which turn out not to be good are not returned before the time of closing of the paying bank, the conditional payment becomes absolute, a finding for the plaintiff is not warranted. *Atlas National Bank* v. *National Exchange Bank*, 300.

## NEGLIGENCE.

1. A person who, entering a building where he never has been before, without knocking or ringing a bell, finds himself in darkness, and instead of waiting where he is and endeavoring to attract the attention of the family, or retreating, chooses to try to find his way, and while so doing falls down the cellar stairs, is not in the exercise of due care. *Campbell* v. *Abbott*, 246.
2. Persons who are struck when it is dark by a car on the track of a railroad company while they are engaged in a voluntary work for their own benefit, namely, that of carrying a tricycle that it might go earlier than in the regular course of transportation, they having disregarded the suggestion of the defendant's servant to take the tricycle by a safe way, and who, although they are honestly told that the tracks are clear, must have known that, as regards the chances of cars coming unexpectedly, they were acting at their own risk, are not in the exercise of due care. *Martyn* v. *New York & Boston Despatch Express Co.* 401.
3. If, in an action for personal injuries occasioned to the plaintiff while passing on the sidewalk by the fall of bricks from a chimney on the house of the defendant, it appears that the relation between the defendant and the contractor employed in repairing the chimney was that of contractor and contractee, instructions to the jury which allow them to find a verdict for the plaintiff, not upon the ground that the chimney was a nuisance "likely to do mischief," but upon the ground that the work of repair

Digitized by Google

called for by the contract was necessarily a nuisance within the rule stated in *Woodman* v. *Metropolitan Railroad*, 149 Mass. 335, are incorrect; and the defendant is not answerable for the negligence of the contractor. *Boomer* v. *Wilbur*, 482.

4. At the trial of an action for personal injuries occasioned to the plaintiff by a collision of the wagon in which he was riding and an electric car of the defendant at the junction of C. and N. streets, the defendant requested a ruling that if the plaintiff attempted to hurry across the street in front of a rapidly approaching electric car he assumed the risk of collision. In support of this request the defendant contended that the plaintiff was aware, before he turned to cross the tracks, that the car was approaching and that it was running very fast. Reference was made to the plaintiff's testimony on cross-examination that, when he started to turn, the car was "just west of the corner of A. Street; that he did not know whether it had stopped at the corner or not; that he should judge it was moving; that he could not say how fast it was then going; that when the car was about at D.'s liquor store it was going very fast; and that the seat on which he was sitting was then over the space between the two lines of track." The distance between A. Street and N. Street was one hundred and ninety-eight feet, and the liquor store was about opposite S. Place, which was about half way between A. Street and N. Street. There was nothing to impede the view of both the motorman and the plaintiff as they approached each other. *Held*, that the theory of the defendant was not supported by the evidence. *Scannell* v. *Boston Elevated Railway*, 170.

5. If, in an action for personal injuries occasioned to the plaintiff by a collision of the wagon in which he was riding and an electric car of the defendant, the judge instructs the jury that the care required of the plaintiff or the defendant is that care which a reasonably prudent person would exercise under like circumstances, and the situation is clearly pointed out to the jury, a request by the defendant for a ruling that the driver of a wagon on a street where electric cars run must use more care than when he drives on a street where they do not run, is rightly refused. *Ibid.*

6. In an action for personal injuries occasioned to the driver of a covered express wagon and his employee by the collision thereof with an electric car, evidence on which the jury could find that both plaintiffs looked to see if a car was coming when, seated as they were in the wagon, they were fifteen feet from the track; that their view was obstructed until they reached that point; that they saw the car and each thought that it was then one hundred to one hundred and five feet away, and that in fact the car was then about one hundred feet away; that they thought they had ample time to cross the tracks, and for that reason drove across at a walk; and, finally, that the car was being driven at a rate of fifteen to seventeen miles an hour, in place of eight miles an hour as the city ordinance required, authorizes a finding that the plaintiffs thought that the motorman saw them and would look out for them, and that they were in the exercise of due care, whether their estimates were right or not; their estimates, as a matter of fact, being right. *Creavin* v. *Newton Street Railway*, 529.

7. At the trial of an action for personal injuries, there was testimony tend-

Digitized by Google

ing to show that the plaintiff came down C. Street on the right hand side towards W. Street, and that he was riding slowly and ringing the bell of his bicycle, and that before crossing W. Street he looked northerly and saw the hack driven by the defendant's servant, and "tried to make a sharp turn to get out of the way of the carriage, but he (meaning evidently the driver) made a turn quickly, then the pole caught me and knocked me off my bicycle and threw me underneath the horses' feet." The plaintiff had no lamp on his bicycle, and C. Street was dark but W. Street was light. There was testimony for the defendant that the plaintiff was riding very fast, and that he was on the left hand side of C. Street. There was also testimony for the plaintiff that the defendant's servant was driving very fast, and, as tending to corroborate that, that the hack went forty or fifty feet after the collision before it stopped, and that after the driver had dismounted the passenger told him to get on and go where he was going, that he wanted to get there in a hurry. The driver also testified on cross-examination that if the plaintiff was on the right hand side of C. Street and riding slowly, he would have seen him if he had looked. *Held*, that the questions of the due care of the plaintiff and of the negligence of the defendant's driver were for the jury. *Stinson* v. *Kenny*, 429.

8. In an action for personal injuries a ruling requested by the defendant "that the whole evidence is as consistent with plaintiff's want of due care as with his exercise of due care, and he is not entitled to recover," is rightly refused, whether it was so or not being a question of fact, under proper instructions, for the jury. *Ibid.*

See ACTION, 3, 4; CARRIER; EMPLOYERS' LIABILITY ACT; EVIDENCE, 6, 13–15, 22, 25, 26; HIGHWAY; MASTER AND SERVANT; PRINCIPAL AND AGENT, 1; TRIAL, 8–11.

## NOTICE.

See ASSIGNMENT, 1; CARRIER, 2; EMINENT DOMAIN, 8; EVIDENCE, 5; HIGHWAY, 4; INSURANCE, 1, 3; INTOXICATING LIQUORS, 1; MORTGAGE, 2; SAVINGS BANK, 1, 3; SPECIFIC PERFORMANCE; TRIAL, 4.

## NUISANCE.

See NEGLIGENCE, 3.

## OATH.

See TRADE-MARK, 1.

## OFFICE.

See CORPORATION 6.

Digitized by Google

## OLEOMARGARINE.

See COMPLAINT, 2–5.

## OPTION.

See CONTRACT, 5.

## PARENT AND CHILD.

See EMPLOYERS' LIABILITY ACT, 4, 6.

## PARK COMMISSIONERS.

The remedy for damages to property for changes in the flow of surface water caused by certain acts of the park commissioners of the city of Boston and of the city itself, and also for discharging the contents of an old cellar drain from a building within the park limits, is under St. 1875, c. 185, and not by an action of tort. *Holleran* v. *Boston*, 75.

## PARTIES.

Two persons, each of whom is jointly liable with another for the amount of a promissory note, may join in one action, after payment of the note by them, to recover from him his share of the sum so paid; and if one of the plaintiffs dies after action brought, the other may maintain the action for the benefit of himself and the estate of the deceased plaintiff. *Weeks* v. *Parsons*, 570.

See CORPORATION, 1; PROMISSORY NOTE, 1–3.

## PARTITION.

See EQUITY, 5.

## PARTNERSHIP.

1. A partnership, consisting of A., B., and C., which was a continuation of a previous partnership between A. and B., was formed for two years, each partner contributing a certain sum to the capital, and the profits and losses to be shared in certain proportions. The articles of partnership provided that the several contributions to the capital should be paid by the transfer to the new firm of the property belonging to the old firm; and that if either of the partners should die during the continuance of the partnership, the business might be carried on by the survivors, and the interest of the deceased partner in the property of the firm for all purposes should be taken to be "the balance standing to his credit as of the next preceding annual account taking of the stock, assets, and debts owing to and by the said firm." An annual account of the stock, assets, and debts of

Digitized by Google

the old firm was taken on the day the new partnership began, showing a balance to the credit of each partner, and a portion of these assets was transferred to the new firm. A. died during the first year of the new partnership, and the business of the firm was continued by the other partners as the contributions of A. and B. The contribution to the new partnership made by C. was the amount then due to him as an employee of the old firm. *Held*, on a bill in equity to obtain A.'s share of the profits upon the basis of the proportional percentage fixed by the articles of partnership, that the account taken on the day the new firm was formed was adopted by that firm as its first "annual account taking," and was the "next preceding annual account taking" of that firm, within the meaning of the partnership articles, and determined the amount of A.'s interest in the partnership property. *Kelly* v. *Morrison*, 531.

2. A bill in equity by the administrator of the estate of a deceased partner against the other partners, to obtain the intestate's share of the profits of the partnership, will not lie also to obtain the exhibition of the books and papers of the firm, upon an allegation that the firm did business here and in another State, and that an official named threatened to assess and collect a tax from the plaintiff on the interest of the deceased partner in the property of the firm in that State on the day of his death, and in order to ascertain the amount of such tax threatened to appraise the property there. *Ibid.*

3. If, in the case of a limited partnership, the certificate of renewal is made upon the theory that the continuation of the interest of the special partner in the assets of the expiring firm is a contribution to the capital of the new firm equal in amount to that originally contributed, and it appears that the capital has been substantially impaired by losses in business and no fresh capital is then contributed, the St. of 1887, c. 248, is not complied with, and all the members of the new firm are subject to the liabilities of general partners. *Durgin* v. *Colburn*, 110.

See SET-OFF, 1; TRADE-MARK, 1.

## PASSENGER.

See CARRIER, 1.

## PATENT.

See CONTRACT, 5.

## PAYMENT.

See CONTRACT, 4; CREDITORS; FOREIGN CORPORATION, 3; LIEN; LIMITATIONS, STATUTE OF, 2; NATIONAL BANK; SAVINGS BANK, 2–4.

## PENALTY.

See COLLATERAL SECURITY, 1; TRUSTEE PROCESS, 3.

Digitized by Google

PERSONAL PROPERTY.

See CHATTEL MORTGAGE; CONSTITUTIONAL LAW, 6.

PHYSICIAN.

See EVIDENCE, 12.

PLAN.

See EXCEPTIONS, 6.

PLEADING.

See AMENDMENT; ASSIGNMENT, 2; COMPLAINT, 1, 3–5; DECLARATION; EQUITY, 2, 6; TRIAL, 13; WRIT OF ENTRY.

PLEDGE.

See ASSIGNMENT, 3; COLLATERAL SECURITY; CONSTITUTIONAL LAW, 6; CONVERSION, 2, 3; CORPORATION, 2–5; ESTATES OF PERSONS DECEASED, 2.

POND.

See EMINENT DOMAIN, 3, 4; EQUITY, 8, 9.

PRACTICE.

See ABORTION; AMENDMENT; CERTIORARI; COMPLAINT; COSTS; EQUITY, 5, 7; EXCEPTIONS; JUDGMENT; JURISDICTION; LIBEL, 2; LIMITATIONS, STATUTE OF, 1; PARTIES; SET-OFF; SUPERIOR COURT; TRIAL; TRUSTEE PROCESS; WILL, 1; WITNESS; WRIT OF ENTRY; WRIT OF ERROR.

PREFERENCE.

See CREDITORS.

PRESCRIPTION.

See RAILROAD, 2.

PRESUMPTION.

See WILL, 3.

Digitized by Google

## PRINCIPAL AND AGENT.

1. At the trial of an action seeking to charge the defendant corporation with the alleged results of a doctor's examination of the plaintiff, it appeared that the plaintiff had met with an accident and had sued the defendant, whereupon the defendant forthwith sent a doctor to examine him; that the plaintiff's trouble was in his left leg, and the doctor, after directing him to stand upon his right leg, told him to stand upon his left leg; that the plaintiff said that he could not, and his own doctor also said that he could not bear his weight upon that leg; that the examining doctor then told the plaintiff to "try standing on his left leg," and that the plaintiff tried it, fell, and attributed subsequent hysterical trouble to this cause. *Held*, that the doctor was not an agent or servant of the defendant, but an independent contractor; that the argument drawn from the liability of a litigant for his attorney could not avail, and that a verdict was rightly directed for the defendant. *Pearl* v. *West End Street Railway*, 177.
2. If a director of a corporation, who, with other directors, indorses a promissory note made by the corporation with the understanding that the indorsements shall be joint and not several, buys a portion of the assets of the corporation sold by an assignee at public auction and afterwards sells them, it not appearing that the sale by the assignee was not conducted fairly and in good faith, such director is not required to account for the profit, if any, which he may have made by the purchase and sale, in an action by him, after he has paid the note, to recover contribution from a co-indorser. *Weeks* v. *Parsons*, 570.

See Attorney and Client; Broker; Contract, 2; Intoxicating Liquors, 2; Promissory Note, 6–8, 10.

## PRINCIPAL AND SURETY.

See Assumpsit; Bastardy Process; Indorsement.

## PRIORITY.

See Receiver.

## PROBATE COURT.

See Distribution; Husband and Wife; Residence; Will, 3; Witness, 2.

## PROMISSORY NOTE.

1. Even if it be true that a promissory note was transferred to the plaintiff after maturity and without consideration, for the purpose of bringing an action in this State, still he can maintain the action in the right of his transferrer, if the latter is a *bona fide* holder, before maturity, for value. *Edgerly* v. *Lawson*, 551.

Digitized by Google

2. One who writes on the back of a promissory note, "I hereby guarantee the payment within note," is a guarantor and cannot be sued as an indorser. To maintain the action against him as guarantor it must be brought in the name of the person to whom the promise was made. *Edgerly* v. *Lawson*, 551.

3. Whether St. 1897, c. 402, entitled "An Act relative to actions upon assigned claims," is applicable to this case, which is one of guaranty of payment of a promissory note, the question not having been raised in the court below or in this court, and the statute having been passed subsequently to the guaranty and after the date of the writ, *quære*. *Ibid.*

4. Evidence tending to show a want of consideration for a promissory note, unaccompanied by evidence that the plaintiff did not take the note for value, in good faith, before maturity, is no defence to an action on the note. *Produce Exchange Trust Co.* v. *Bieberbach*, 577.

5. In actions tried together against the maker and the indorsers of promissory notes made by a corporation, a note book containing entries of the making of other notes similarly signed and of the notes in suit, and of the payment of the other notes but not of the notes in suit, (the book and paid notes having been turned over to a receiver of the corporation with its effects,) and the notes so paid are rightly admitted in evidence as competent against the corporation, no request having been made that the effect of the evidence should be limited to the corporation. A request that the notes be not admitted as standards of handwriting is too broad, and a request that the purpose for which they are received be restricted is too indefinite. *Ibid.*

6. That A. represented the bank which discounted certain promissory notes made by a brewing company in erecting the brewery, that the notes were first sent to him and by him delivered to the bank, that the proceeds of one of the notes were credited to his account as agent, that the bank allowed him to overdraw that account, and that the notes were replaced in his hands for a day for some undisclosed purpose after they had become the property of the bank, do not justify a finding, in actions against the maker and the indorsers of the notes, that there was any fraud upon any of the defendants, either in issuing the notes or in dealing with their proceeds; nor does the fact that the notes were handed back to A. by the cashier of the bank for a day long after the time when they had been discounted have any tendency to show that the latter was a discounting officer. *Ibid.*

7. If a promissory note issued by the officers of a corporation is signed by them, and is also indorsed by them and by others, with the intention that it shall be the note of the corporation, but the name of the corporation is accidentally omitted from the face of the note, such omission may be supplied by the insertion of its name without affecting the validity of the note; and the facts that the note was in the note book of the corporation and that it was similar to many other paid notes of the corporation, with the single exception of the omitted name, are ample evidence that the omission of the name was an accident. *Ibid.*

8. A promissory note made upon a blank form, signed by "A. secretary"



Digitized by Google

and "B. president," payable "to the order of ourselves," and indorsed "W. Brewing Company, B. president, A. secretary," filled out and the name of the corporation indorsed in the handwriting of A., is the note of the corporation. *Produce Exchange Trust Co.* v. *Bieberbach*, 577.

9. The rights of the maker or of a prior indorser of a promissory note are not affected by the forgery of the name of a subsequent indorser. *Ibid.*

10. Evidence of the payment by a corporation of many similar promissory notes executed and issued by the same officers and entered upon the same note book with the notes in suit disposes of the contention that there was a failure to prove the authorized issue of the latter notes by the corporation or their execution by its officers thereto authorized. *Ibid.*

See ACTION, 2; ATTORNEY AND CLIENT, 2; ELECTION, 2; EQUITY, 2; ESTATES OF PERSONS DECEASED, 1, 2; EVIDENCE, 17–20; FRAUDS, STATUTE OF; INDORSEMENT; MECHANIC'S LIEN, 5; NATIONAL BANK; PARTIES; PRINCIPAL AND AGENT, 2; TRIAL, 2, 3.

## PUBLIC CHARITY.

1. A gift by will to Harvard College which is to be held as a permanent fund, and the income of which, less five per cent to be accumulated, is to be expended for such general purposes of the corporation as the president and fellows shall deem most useful, unless it is all expended in a certain department of the charitable work which the testator designates, and for which he directs a preference, by the officers of the college in the administration of the proceeds of the fund, is a valid gift to a public charity; and there is no ground for the contentions that in making the gift the testator was precluded by law from directing that it should be devoted primarily to the establishment of scholarships, and that in providing for its administration he was precluded from directing that preference should be given to his kin or to any other class of persons that he favored; and even if this provision for preference of kin were held to be void, the bequest for general uses of the college would still be valid as a residuary provision, which applies to void legacies as well as to legacies which lapse for any other cause. If the requirement that five per cent of the annual income shall be reserved for accumulation be treated as void, or if the operation of it be limited to a term of years, the gift will remain without change except as affected by omitting to reserve a part for accumulation. *Dexter* v. *Harvard College*, 192.

2. A gift by will of the residue of an estate to Harvard College for general use in the medical department, subject to special reasonable directions of the testator for the better endowment of certain professorships, is a valid gift to a public charity. *Ibid.*

3. A testator gave devises by will to "a Rest Home for worthy working girls" and to an "Old Ladies' Home." The agreed facts recited that in neither are the advantages of the institution furnished to the inmates for profit, and in neither is there any provision made for making dividends or profits; that when incorporated they have no capital stock; that their

Digitized by Google

funds are derived from voluntary contributions from benevolent persons, supplemented by such sums as may be received from the inmates, and whatever funds are received are devoted to the purposes of the institution; that a "Rest Home" is a place of rest for girls who are working for small wages, where they may go and board in the country at a low price; that some are endowed, some are under the general management of charitable organizations, and some are managed by trustees; that they are not usually incorporated; that the object of an "Old Ladies' Home" is to provide a home for aged, homeless, and indigent women; that inmates are received and provided with a home during life, including clothing, sometimes without any payment, and sometimes upon the payment of a small fee fixed by the by-laws; that the control is usually vested in managers who serve gratuitously, and that old ladies' homes are usually incorporated. *Held*, that the institutions constituted valid public charities, and that the clause in the will making the devises "the plan to be hereafter devised or left in care of said executor," manifested a general charitable intent, leaving undetermined the particular manner in which it should be carried into effect. *Sherman* v. *Congregational Missionary Society*, 349.

4. The reference in certain clauses of this will to a "Rest Home" is to a valid public charity created by a previous clause in the will, and the gift is valid in each case. *Ibid.*

5. In case of a gift for charitable uses, the general charitable intent being clear, the court will carry it into effect notwithstanding there may be uncertainty in regard to the particular persons or objects intended to be benefited by the testator's bounty; and in this case the gift "to W. C. T. U. or Rest Home in Chicopee Street, Mass.," being to the Massachusetts Woman's Christian Temperance Union, and a Rest Home in Chicopee for worthy working girls, both valid public charities, the legacy is to be divided equally between them. *Ibid.*

See ESTATES OF PERSONS DECEASED, 4; TAX, 2.

PUBLIC OFFICER.

See EMPLOYERS' LIABILITY ACT, 9; INTOXICATING LIQUORS, 2.

PURCHASER FOR VALUE.

See FOREIGN CORPORATION, 3; MORTGAGE, 3; PROMISSORY NOTE, 1, 4.

QUANTUM MERUIT.

See CONTRACT, 7.

QUIET ENJOYMENT.

See EMINENT DOMAIN, 8.

Digitized by Google

## RAILROAD.

1. At the trial of a petition by the selectmen of a town asking for an order to show why the defendant railroad should not be adjudged guilty of a contempt for failing to comply with an order of the county commissioners, and a decree of this court, it appeared that the order decreed how the railroad should cross certain streets, and further provided as to raising and carrying B. Street over the railroad but made no reference to C. Street, from the northerly line of whose westerly terminus a portion of B. Street was originally laid out. The railroad did not touch C. Street, or go over or under it. The decree of this court ordered the defendant to comply with the order of the county commissioners "and to construct said bridge and such approaches thereto as may be necessary, according to the terms of said order." The bill in equity in which the decree of this court was rendered sought merely to have the order of the county commissioners enforced; the evidence showed that the order was fully complied with when the present proceedings were begun, and the petitioner's counsel admitted that the order had been literally complied with. He relied, however, upon the language of Pub. Sts. c. 112, § 120, as to a railroad passing over or under a highway. *Held*, that this section should be read in connection with §§ 135 and 136 of the same chapter; that the basis of the action of the court was a decree of the county commissioners; that the decree was specific and definite; and that the order of the single justice in adjudging the respondent in contempt as to B. Street was erroneous, and in adjudging it not in contempt as to the non-construction of the approaches from C. Street was correct. *Stanley* v. *Old Colony Railroad*, 145.
2. The St. of 1892, c. 275, is intended to prevent the acquisition of rights of way across railroads by prescription, whether the adverse use had been begun prior to the passage of the statute or not, and the "existing right of way" means a right which at the time of the statute had fully ripened into a right by prescription or otherwise. *Simpson* v. *Boston & Maine Railroad*, 359.

See CARRIER, 1; DEED, 2; EMINENT DOMAIN, 3, 4; EMPLOYERS' LIABILITY ACT, 1–4; EQUITY, 6, 8, 9; EVIDENCE, 10, 14, 15; NEGLIGENCE, 2; TRIAL, 4; WAY, 2.

## REAL ESTATE.

See ACTION, 3; BETTERMENTS; BROKER; CONTRACT, 1, 2, 6, 7; DEVISE AND LEGACY, 1, 2; EMINENT DOMAIN; EQUITY, 5; ESTATES OF PERSONS DECEASED, 1, 4; EVIDENCE, 1, 7–10; INSURANCE, 2; LANDLORD AND TENANT; MECHANIC'S LIEN; NEGLIGENCE, 1, 3; TRUST AND TRUSTEE, 1; WAY; WRIT OF ENTRY.

## RECEIPT.

See CARRIER, 2.

Digitized by Google

## RECEIVER.

This case is governed by St. 1897, c. 400, which provides that "in the settlement of estates by receivers the following claims shall be entitled to priority and to be first paid in full in their order: First, All . . . taxes assessed by . . . any . . . city"; and *it seems* that water rates are covered by the statute. *Waite* v. *Worcester Brewing Co.* 283.

See CORPORATION, 1; CREDITORS.

## RECORD.

See EXCEPTIONS, 1; RESIDENCE, 3; TRIAL, 10.

## REDEMPTION.

See ASSIGNMENT, 3; COLLATERAL SECURITY.

## REGISTRATION.

See TRADE-MARK, 2.

## REGISTRY OF DEEDS.

See MECHANIC'S LIEN, 3, 6, 9.

## RELEASE.

See CONTRACT, 1, 2.

## REMAINDER.

See JOINT STOCK COMPANIES.

## REPORT.

See APPEAL, 1; EXCEPTIONS, 5; WRIT OF ERROR, 2.

## RESERVATION.

See DEED; INSURANCE, 2.

## RESIDENCE.

1. A person domiciled in this Commonwealth who, upon his appointment to a judicial office under the government of the United States, resigns a judicial position held by him here, sells his house situated in C. in this Commonwealth, erects a house in Washington, lives there and holds his

Digitized by Google

judicial office continuously for over twenty years and until his death, buys a burial lot there and causes several members of his family to be buried therein, may be found, in an action against his executor to recover taxes assessed in C. on his personal estate after his death, not to have been an inhabitant of C. at the time of his death, although after his removal from C. he described himself in various deeds and in his will as of C., and declared orally that he had not given up his residence therein, and although by the petition for the probate of his will and by the decree thereon he was described as an inhabitant thereof. *Dallinger* v. *Richardson*, 77.

2. An adjudication of the Probate Court upon the question of the residence of a testator at the time of his death is conclusive under the Pub. Sts. c. 156, § 4, so far as respects its own jurisdiction, but is not conclusive upon that question if it is in controversy in another tribunal in a matter not involving the validity of an order or decree of the Probate Court, or some proceeding thereunder. *Ibid.*

3. An executor against whom an action is brought to recover taxes assessed in C. upon the estate of his testator is not estopped of record to deny the residence of his testator in C. by an adjudication of the Probate Court admitting the will to probate that the testator was an inhabitant of C.; nor is he estopped therefrom *in pais* by a statement in writing to the assessors of taxes of C. after the assessment of the taxes that the estate had been paid over and was no longer in his possession, if there is no evidence that the statement was made with the intent that the assessors should rely, or that they did rely, thereon. *Ibid.*

See DIVORCE, 2, 3.

## RESTRICTION.

See DEED, 1.

## RESULTING TRUST.

See EQUITY, 5; TRUST AND TRUSTEE, 1.

## RULES OF COURT.

See SUPERIOR COURT, 2.

## SALE.

If, in an action of replevin against a carrier, it appears that the sale of the merchandise was conditioned on the sending of a note by the buyer to the seller, the question whether there was a waiver of the condition is a question of fact; and the fact that it was not the custom to send the note until after the buyer should verify the quality and count of the merchandise as compared with his order is immaterial, a delivery to the buyer not necessarily being a waiver of the condition, and it making no difference

Digitized by Google

that the buyer could, to a certain extent, suit his own convenience in removing the merchandise from the custody of the carrier; and a usage for the buyer to sell directly from the warehouse, subject to the carrier's lien for charges, does not go far enough, it not appearing that a buyer may sell and pass a good title without acquiring a good title himself. *Silsby* v. *Boston & Albany Railroad*, 158.

See CONTRACT, 4; INSURANCE, 2; LORD'S DAY; MORTGAGE · TRADE-MARK, 3.

## SAVINGS BANK.

1. In an action by an administrator to recover of a savings bank the balance due on a deposit made by the intestate in 1861, it appeared that there was a fire in 1867 in the house occupied by the intestate, and that a good many of his papers were destroyed; that the intestate died in 1868; that the treasurer of the bank had been connected with the institution for twenty-five years, and that no one had demanded payment of the account or had presented the deposit book; and that some time between April, 1863, and October, 1875, notice was given, though it did not appear by whom, that the book was lost. *Held*, that it could not be said that the most reasonable way of accounting for the non-production of the book was not that it was destroyed among other papers in the fire, or that a finding that it was so destroyed was clearly erroneous. *Hudson* v. *Roxbury Institution for Savings*, 522.
2. In an action by an administrator to recover of a savings bank the balance due on a deposit made by the intestate, the deposit book having been destroyed, the plaintiff is excused from producing it, and requests based upon the necessity of presenting the book to obtain payment are, therefore, rightly refused. *Ibid.*
3. In an action to recover of a savings bank the balance due on a deposit, a finding that the bank through its treasurer had waived the right to any other or further notice of withdrawal than such as was given before the commencement of the action, disposes of a request for a ruling that the plaintiff was not entitled to withdraw his principal or any part thereof until a certain number of days after notice given to the treasurer of intention to make such withdrawal, unless the treasurer should, at his option, make payment upon shorter notice. *Ibid.*
4. In an action by an administrator to recover of a savings bank the balance due upon a deposit made in 1861 by the intestate, who died in 1868, the question of identity having been settled in favor of the plaintiff, the defendant having substantially admitted the identity of the depositor with the plaintiff's intestate, and the court having found that the deposit book had been destroyed, there would seem to be no good reason why, on general principles, the plaintiff should be required to furnish a bond of indemnity as a condition of payment by the defendant, or that payment should be refused because not having been ordered by the investing committee conformably to a by-law — Article 26 — adopted long after the plaintiff's intestate had signed a deposit book assenting to by-laws

Digitized by Google

then in force, and "to those which may be hereafter made pursuant to the power granted in the third article," the third article providing for further regulations or by-laws or alterations of those already made, and that "all such regulations, by-laws, and alterations shall be equally binding on all depositors as those by them subscribed, after the same shall have been duly made known"; and there being nothing to show that Article 26 of the amended by-laws was ever made known to the plaintiff's intestate, or to any one having any authority to represent him or his estate, or that any steps were taken to make it known to him or them. *Hudson* v. *Roxbury Institution for Savings*, 522.

SCHOOL.

See MECHANIC'S LIEN, 1; TOWN.

SEPARATE SUPPORT.

See HUSBAND AND WIFE.

SERVICE.

See JURISDICTION.

SET-OFF.

1. Part owners of a vessel brought an action at law against a ship's husband to recover their share of a dividend. The defendant was the survivor of two partners who had acted as ship's husbands of a barque, which had been on voyages resulting in a loss, six sixty-fourths of which was due from the plaintiffs as owners of that undivided share in the vessel. *Held*, that the defendant's claim against the plaintiffs could not be availed of in set-off. *McLauthlin* v. *Smith*, 46.
2. If, when an action is brought to collect a debt due from the defendant, there is pending in the same court a bill in equity brought by the defendant against the plaintiff to enforce contribution, the defendant should move to have the action at law continued until the bill in equity reaches a decree, and then move to have the judgment and decree set off one against the other and execution issued or a final decree entered for the balance due him or his adversary, as the case may be. *Ibid.*

See ATTORNEY AND CLIENT, 1, 5; BETTERMENTS, 1; EMINENT DOMAIN, 6; FOREIGN CORPORATION, 3.

SEWER.

An assessment under St. 1892, c. 402, relating to sewers in the city of Boston, being void, and the payment by the plaintiff having been induced by compulsory process and made under protest, it may be recovered

Digitized by Google

back in an action of contract; and the fact that the collection was made under St. 1891, c. 323, §§ 16, 18, by adding part of the assessment to the general tax of the plaintiff, does not affect his right. *Dexter* v. *Boston*, 247.

See BETTERMENTS, 1; CONSTITUTIONAL LAW, 2, 3.

SHIPS AND SHIPPING.

See SET-OFF, 1.

SIDEWALK.

See HIGHWAY, 3.

SIGNATURE

See TRIAL, 12.

SLANDER.

1. If, in an action of tort for slander, the plaintiff's testimony would warrant a finding by the jury that the defendant was actuated by express malice in calling the plaintiff a thief, additional damages for the injury to his feelings should be awarded on that account; and it is therefore competent for the defendant to answer "No" to the question "Whether or not you intended to accuse the plaintiff of the crime of stealing?" and the plaintiff having contended that the defendant's language as testified to by him, namely, "If you have got the money in your pocket and do not pay your rent, you are acting like a thief," the defendant being the plaintiff's landlord, was so spoken as to be an insinuation which would be understood as charging the plaintiff with being a thief, the answer is also competent as bearing upon this contention. *Faxon* v. *Jones*, 206.
2. In an action of tort for slander, a witness having given testimony favorable to the plaintiff on the question in dispute between the parties as to what the defendant's words were, the defendant's contention being that his language did not constitute a charge of larceny against the plaintiff, but related only to a controversy about the payment of rent, it is competent to ask the witness in cross-examination, as tending to control or modify his testimony in chief, whether he did not understand the epithets used by the defendant towards the plaintiff to relate to the failure to pay rent; and his affirmative answer to this question is a modification of his direct testimony proper for the consideration of the jury. *Ibid.*

See LIBEL; TRUSTEE PROCESS, 1.

SPECIFIC PERFORMANCE.

The validity of a foreclosure sale, made not at the instance of the mortgagee or for the purpose of getting payment of the mortgage debt, but for the

Digitized by Google

benefit of a purchaser of the equity under a defective conveyance, and for the purpose of curing that defect by cutting off the interest of a legal owner, that owner and his only known attorney being residents of foreign countries, so distant that the notice of the sale could not be expected to reach them, is so doubtful that no one should be compelled to take a title depending upon it for validity. *Martin* v. *Hamlin*, 180.

See EQUITY, 8, 9.

## STATUTE.

See ACTION, 4; APPEAL, 2; BASTARDY PROCESS; BETTERMENTS, 1, 2; COLLATERAL SECURITY; COMPLAINT; CONSTITUTIONAL LAW; CORPORATION, 3–5; DEVISE AND LEGACY, 3; DIVORCE, 2, 3; ELECTION, 2; EMINENT DOMAIN, 1–4, 7–9; EMPLOYERS' LIABILITY ACT; ESTATES OF PERSONS DECEASED, 1; EVIDENCE, 6–9; FOREIGN CORPORATION; HIGHWAY, 1, 4; HUSBAND AND WIFE; INTEREST, 2; INTOXICATING LIQUORS, 1; LIBEL, 5; LORD'S DAY; MECHANIC'S LIEN, 3; MILK; PARK COMMISSIONERS; PARTNERSHIP, 3; PROMISSORY NOTE, 3; RAILROAD; RECEIVER; RESIDENCE, 2; SEWER; SUPERIOR COURT, 2; TAX, 1, 2; TOWN; TRADE-MARK; TRIAL, 12, 13; TRUSTEE PROCESS, 2; WITNESS.

## STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

## STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

## STATUTES CITED, EXPOUNDED, ETC.

### ENGLISH STATUTES.


| | | |
|---|---|---|
| 43 Eliz. c. 4, § 1. | Charity | 194 |
| 57 & 58 Vict. c. 30, §§ 7 (4), 20. | Legacy Tax | 191 |
| 60 & 61 Vict. c. 37, § 7, cl. 2. | Dependency | 267 |


### REVISED STATUTES OF THE UNITED STATES.


| | | |
|---|---|---|
| § 905. | Evidence | 296 |


### STATUTES OF THE UNITED STATES.


| | | |
|---|---|---|
| June 13, 1898, c. 448, §§ 29, 30. | Legacy Tax | 191 |
| July 1, 1898, c. 541, § 70. | Bankrupt | 185, 545 |


### STATUTES OF DAKOTA.


| | | |
|---|---|---|
| Comp. Laws, § 2578. | Divorce | 93 |


Digitized by Google

STATUTES OF KANSAS.

| | | |
|---|---|---|
| Gen. Sts. 1889, par. 1192. | Corporation | 296 |

STATUTES OF NEW YORK.

| | | |
|---|---|---|
| 1 Rev. Sts. 765, § 11. | Partnership | 111 |

STATUTES OF PENNSYLVANIA.

| | | |
|---|---|---|
| 1835–36, No. 51, § 11. | Partnership | 111 |

STATUTES OF SOUTH DAKOTA.

| | | |
|---|---|---|
| 1890, c. 105, § 1. | Statute | 93 |

STATUTES OF THE COMMONWEALTH.

| | | |
|---|---|---|
| 1786, c. 67, § 4. | Way | 25 |
| —— c. 81, § 1. | " | 413 |
| 1788, c. 66. | Estates of Persons Deceased | 142 |
| 1791, c. 28. | " " " | 143 |
| 1792, c. 33. | " " " | 143 |
| 1825, c. 171, § 2. | Way | 26 |
| 1827, c. 77, §§ 4, 7. | " | 26 |
| 1828, c. 103, § 3. | " | 26 |
| 1835, c. 48, §§ 3, 4, 5, 6. | Partnership | 111 |
| —— c. 152, §§ 7, 8. | Way | 26 |
| 1838, c. 98, § 3. | Corporation | 443 |
| —— c. 104. | Way | 414 |
| 1841, c. 9. | Bankrupt Act | 466 |
| 1844, c. 178, § 3. | Insolvent Debtor | 465 |
| 1851, c. 214. | Way | 25 |
| —— c. 233, § 112. | Evidence | 366 |
| 1852, c. 294, § 1. | Estates of Persons Deceased | 143 |
| —— c. 312, § 73. | Evidence | 364 |
| —— —— § 75. | " | 366 |
| 1871, c. 382. | Betterment | 27 |
| 1872, c. 177, § 4. | Boston | 406 |
| 1873, c. 165. | Way | 25 |
| 1875, c. 185, §§ 3, 5. | Boston Park Commissioners | 76 |
| 1877, c. 234. | Way | 413 |
| 1879, c. 245, § 5. | Insolvent Debtor | 465 |
| 1881, c. 206, §§ 1, 2, 9. | Framingham | 407 |
| 1883, c. 223, § 14. | Equity | 298 |
| 1884, c. 186, § 1. | Cemetery | 513 |
| —— c. 271, §§ 1, 2, 5. | Framingham Water Company | 408 |
| —— —— § 12. | " " " | 407 |
| —— c. 330. | Corporation | 219 |
| 1885, c. 384, § 12. | Courts | 56 |
| 1887, c. 124. | Betterment | 28 |


Digitized by Google

| | | |
|---|---|---|
| 1887, c. 248, § 3. | Partnership | 111 |
| —— ——— § 4. | " | 113 |
| —— c. 270. | Employers' Liability Act | 369, 422 |
| —— ——— § 1, cl. 2. | " " " | 125 |
| —— ——— § 1, cl. 3. | " " " | 269, 398 |
| —— ——— § 2. | " " " | 266 |
| —— c. 323. | Intoxicating Liquor | 69 |
| 1888, c. 309, §§ 1, 2. | Brockton | 16 |
| —— c. 325, § 1. | Forcible Entry and Detainer | 236 |
| —— c. 429, §§ 8, 15. | Beneficiary Association | 470 |
| 1889, c. 311, § 1. | Auditor's Report | 265 |
| 1890, c. 428, § 5. | Grade Crossing | 102 |
| 1891, c. 58, §§ 1, 3. | Oleomargarine | 133 |
| —— c. 123. | Grade Crossing | 102 |
| —— c. 323. | Boston | 596 |
| —— ——— §§ 16, 18. | " | 252 |
| —— c. 341. | Corporation | 219 |
| —— c. 412, §§ 6, 11. | Oleomargarine | 134 |
| —— c. 425. | Collateral Successions | 191 |
| 1892, c. 191. | Mechanic's Lien | 165 |
| —— c. 260. | Employers' Liability Act | 393 |
| —— c. 275. | Railroad | 362 |
| —— c. 402. | Boston | 250 |
| —— c. 418. | " | 596 |
| 1893, c. 339, § 2. | " | 211 |
| —— c. 342. | " | 97 |
| —— c. 423, §§ 25, 26. | Superintendent of Streets | 423 |
| —— c. 443, §§ 1, 4, 7. | Trade-mark | 130 |
| —— c. 472, § 5. | Pharmacist | 70 |
| —— c. 478. | Boston Subway | 14 |
| 1894, c. 108. | Boston and Southborough | 600 |
| —— c. 317, § 21. | Savings Bank | 480 |
| —— c. 354, § 1. | Tax | 387 |
| —— c. 367, §§ 8, 14. | Beneficiary Association | 470 |
| —— c. 439. | Boston | 99, 211 |
| —— c. 479. | Bicycle | 414 |
| —— c. 508, § 2. | Intimidation | 503 |
| —— c. 548, § 25. | Boston Subway | 10 |
| —— ——— § 26. | " " | 14 |
| —— ——— § 38. | " " | 15 |
| 1895, c. 378. | Street Railway | 108 |
| —— c. 434, § 2. | Lord's Day | 6, 104 |
| —— c. 440, § 6. | Boston Subway | 15 |
| —— c. 449. | Boston | 596 |
| —— c. 462, § 4. | Trade-mark | 129 |
| —— c. 497. | Pawnbroker | 290 |
| 1896, c. 257. | Grade Crossing | 102 |
| —— c. 377, § 1. | Oleomargarine | 133 |


Digitized by Google

| | | |
|---|---|---|
| 1896, c. 397, § 12. | Pharmacist | 70 |
| —— c. 492. | Boston Subway | 14 |
| —— c. 516. | Railroad | 116 |
| 1897, c. 227, § 1. | Intoxicating Liquor | 70 |
| —— c. 338, § 4. | Groton Water Company | 119 |
| —— c. 347. | Boston Transit Commission | 11, *n.* |
| —— c. 400. | Preferred Claim | 284 |
| —— c. 402, § 1. | Assigned Claim | 553 |
| —— c. 500, §§ 17, 18 | Boston Subway | 12 |
| 1898, c. 121. | Bicycle | 415 |
| —— c. 351. | " | 415 |
| —— c. 466. | Superintendent of Schools | 475 |
| —— c. 474, §§ 11, 17. | Beneficiary Association | 470 |
| —— c. 490. | Abuse of Corporate Powers | 12 |
| —— c. 535. | Evidence | 266 |
| —— c. 577, §§ 1, 10 | Loan | 20 |
| —— —— § 4. | " | 22 |
| 1899, c. 169. | Milk | 293 |
| —— c. 223. | " | 292 |
| —— c. 340. | Renovated Butter | 134 |
| —— c. 409, §§ 5, 28. | Indictment | 134 |
| —— c. 474. | Bicycle | 415 |
| 1900, c. 440, § 1 | Lord's Day | 5, *n.* |

**Revised Statutes.**

| | | |
|---|---|---|
| c. 24, §§ 1–7, 9. | Way | 26 |
| c. 25, § 1. | " | 413 |
| c. 34, § 6. | Partnership | 111 |
| c. 66, §§ 3, 5. | Estates of Persons Deceased | 143 |
| c. 70, §§ 13, 14. | " " " | 143 |
| c. 83, § 12. | Probate Court | 80 |
| c. 103, § 33. | Partition | 454 |
| —— § 68. | " | 455 |

**General Statutes.**

| | | |
|---|---|---|
| c. 43, § 8. | Way | 26 |
| —— §§ 1–7. | " | 23 |
| —— § 12. | " | 25 |
| c. 44, § 1. | " | 413 |
| c. 55, § 6. | Partnership | 111 |
| c. 68, § 13. | Corporation | 443 |
| c. 97, §§ 5, 8. | Estates of Persons Deceased | 143 |
| c. 101, §§ 31, 32. | " " " | 143 |
| c. 118, § 79. | Insolvency | 465 |

**Public Statutes**

| | | |
|---|---|---|
| c. 11, § 20, cl. 7. | Tax | 81, 386 |
| —— §§ 38, 44, 48. | " | 386 |


Digitized by Google

| | | |
|---|---|---|
| c. 27, § 28. | Town | 21 |
| —— § 129. | " | 12 |
| c. 44, § 21. | Schools | 476 |
| c. 49, §§ 1–7. | Way | 23 |
| —— §§ 10, 13. | " | 27 |
| —— § 14. | " | 103 |
| —— §§ 14, 32, 105. | " | 119 |
| —— § 33. | " | 120 |
| —— § 58. | " | 32 |
| c. 52, § 1. | " | 413 |
| —— § 18. | " | 414 |
| —— § 19. | " | 602 |
| c. 75, § 7. | Partnership | 111 |
| c. 77, § 3. | Interest | 21, 44 |
| c. 85, §§ 6, 7, 8, 15, 20. | Bastard | 232 |
| c. 100, §§ 5, 6, 16. | Intoxicating Liquor | 68 |
| —— §§ 7, 9, cl. 7. | " " | 69 |
| —— § 23. | " " | 69 |
| c. 105, § 25. | Corporation | 443 |
| c. 112, §§ 120, 135, 136. | Railroad | 149 |
| c. 125, § 1, cl. 5. | Descent | 244 |
| c. 127, § 1. | Will | 337 |
| —— § 23. | " | 244 |
| —— § 24. | " | 188 |
| c. 135, § 3, cl. 2. | Distribution | 244 |
| c. 136, §§ 9, 13, 26, 27. | Estates of Persons Deceased | 143 |
| —— §§ 14, 15. | " " " | 144 |
| c. 137, §§ 28–30. | Insolvent Estates | 393 |
| c. 142, § 9. | Sale of Real Estate | 190 |
| —— §§ 12–17. | Compromise | 192 |
| c. 146, § 41. | Divorce | 94 |
| c. 147, § 33. | Married Woman | 229 |
| c. 156, § 4. | Probate Court | 81 |
| c. 157, §§ 17, 46. | Insolvency | 162 |
| —— § 84. | " | 465 |
| —— §§ 96–98. | " | 56 |
| c. 159, § 42. | Attorney's Lien | 162 |
| c. 164, § 1. | Service of Process | 53 |
| c. 167, § 1. | Forms of Actions | 115 |
| —— §§ 75, 77. | Evidence | 363 |
| —— §§ 79, 80. | " | 115 |
| —— § 80. | " | 274, 330 |
| —— § 82. | Arrest of Judgment | 55 |
| c. 169, § 19. | Witness | 173 |
| —— § 22. | Deposition | 256 |
| c. 171, § 1. | Judgment | 56 |
| —— §§ 25, 26, 27. | Execution | 47 |
| c. 175, § 6. | Forcible Entry and Detainer | 236 |


Digitized by Google

| | | |
|---|---|---|
| c. 178, § 35. | Partition | 454 |
| ——— §§ 47, 63. | " | 455 |
| c. 183, § 1. | Trustee Process | 53, 115 |
| ——— § 86. | " " | 124 |
| c. 187, § 3. | Writ of Error | 55 |
| c. 191, §§ 6, 20. | Mechanic's Lien | 165 |
| ——— § 8. | " " | 86 |
| ——— § 9. | " " | 166 |
| c. 199, § 14. | Witness Fees | 56 |
| c. 207, § 9. | Abortion | 18 |


## STREET.

See HIGHWAY.

## STREET RAILWAY.

See NEGLIGENCE, 4.

## SUCCESSION TAX.

See TAX, 1, 2.

## SUNDAY.

See LORD'S DAY.

## SUPERIOR COURT.

1. The Superior Court may allow an action at law to be amended into a bill in equity, and it has power, when, through a misapprehension, a plaintiff has brought separate actions at law to enforce a cause of action which can only be enforced by one bill in equity, to consolidate the actions and amend the consolidated action into a bill in equity. *Smith* v. *Butler*, 38.
2. The entry of judgment charging trustees in the Superior Court, made by the clerk on the first Monday of the month without a special order of the court, is in accordance with the statutes and the 27th rule of the court. *Rothschild* v. *Knight*, 48.

See BASTARDY PROCESS; EMINENT DOMAIN, 2; MECHANIC'S LIEN, 2.

## SUPPORT.

See EMPLOYERS' LIABILITY ACT, 4, 6, 7; HUSBAND AND WIFE.

## SUPREME JUDICIAL COURT.

See EXCEPTIONS; RAILROAD, 1; WRIT OF ERROR, 2.

Digitized by Google

## SURETY.

See ASSUMPSIT, 3; BASTARDY PROCESS; INDORSEMENT.

## SURFACE WATER.

See PARK COMMISSIONERS.

## TAKING.

See EMINENT DOMAIN.

## TAX.

1. A legacy tax paid to the United States under the St. of June 13, 1898, c. 448, §§ 29, 30, is to be deducted before paying the State succession tax under St. 1891, c. 425. *Hooper* v. *Shaw*, 190.
2. A legacy left to the New England Trust Company of Boston, "the interest of which they will pay to needy aged men and women who had been in better circumstances in early life but had become in want when in old age," is not to or for a charitable institution within the meaning of the collateral inheritance law, St. 1891, c. 425. *Ibid.*
3. In this case, which was a petition for the abatement of taxes paid under protest by executors who had settled the estate and distributed the legacies within four months from the proving of the will, in September, 1896, the basis of assessment was the sworn list of the taxable personal property of the testator held by the executors on May 1, 1897, and filed on June 9, as of May 1; and the court rightly found for the executors. *Batchelder* v. *Cambridge*, 384.

See CONSTITUTIONAL LAW, 2–5; PARTNERSHIP, 2; RECEIVER; RESIDENCE, 1, 3; SEWER.

## TENANTS IN COMMON.

See DEVISE AND LEGACY, 2.

## THREATS.

See DIVORCE, 1; INJUNCTION.

## TIME.

See INSURANCE, 1; TRADE-MARK, 2.

## TITLE.

See BROKER, 2, 3; SALE; SPECIFIC PERFORMANCE; TRUST AND TRUSTEE, 1; TRUSTEE PROCESS, 1.

Digitized by Google

## TORTS.

See ACTION, 3, 4; EMPLOYERS' LIABILITY ACT; EVIDENCE, 2–6, 11, 13–15, 22, 23, 25, 26; HIGHWAY; JUDGMENT; LIBEL; MASTER AND SERVANT; NEGLIGENCE; PARK COMMISSIONERS; PRINCIPAL AND AGENT, 1; SLANDER; TRIAL, 7–11; TRUSTEE PROCESS, 1, 3.

## TOWN.

1. Although St. 1898, c. 466, providing that a certain class of towns may unite in the employment of a superintendent of schools, who is to be elected by ballot in a joint convention of the school committees of the towns comprising the union, intends that the members of the joint committee are to vote individually and not by towns, it cannot be said that a unanimous agreement made in such a convention composed of the school committees of towns, one of which has more members than either of the others, so to apportion the vote as to secure an equal representation for each town is unlawful. *Reed* v. *Deerfield*, 473.
2. It is within the power of a joint convention of the school committees of towns uniting in the employment of a superintendent of schools, under St. 1898, c. 466, at an adjourned meeting, to rescind its vote for a superintendent of schools at the previous meeting, although the vote was by ballot, as required by the statute. *Ibid.*

See CERTIORARI; EMINENT DOMAIN, 4; EMPLOYERS' LIABILITY ACT, 9; ESTATES OF PERSONS DECEASED, 4; EVIDENCE, 13; HIGHWAY, 4; INTOXICATING LIQUORS, 2.

## TRADE-MARK.

1. It is sufficient if the certificate required to be filed under St. 1893, c. 443, relative to trade-marks gives the name of a partnership; and the declaration required by the statute may be verified by the oath of one of the partners. *Commonwealth* v. *Rozen*, 129.
2. At the trial of a complaint for using counterfeit trade-marks it appeared that two of the certificates, required by St. 1893, c. 443, to set forth the length of time, if any, during which the trade-mark had been in use, read "since about 1888," and a third "since the year 1888," and that the two former had in fact been in use two or three years and the latter some nine years or more. *Held*, that the difference was to the disadvantage of the applicants, if anybody; and that it was no ground for invalidating the registration. *Ibid.*
3. If at the trial of a complaint for using counterfeit trade-marks there is no evidence as to where the defendants intended to sell the goods or where the firms having the trade-marks sold theirs, beyond the fact that all parties concerned had their places of business in Boston, it is a sufficient answer to the objection that enough does not appear to make the act constitutionally applicable to the defendants, and that a verdict should have



Digitized by Google

been directed for them as requested, that if it would be a defence to show that goods to which counterfeit trade-marks had been attached in this State were intended solely for sale in other States, the defendants were called upon to give some evidence of the intent. The government made out at least a *prima facie* case by establishing the facts admitted. *Commonwealth* v. *Rozen*, 129.

## TRAVELLER.

See HIGHWAY, 2, 4; NEGLIGENCE, 4–8.

## TRIAL.

1. A request for a ruling based upon a fact of which there is no evidence is rightly refused. *Produce Exchange Trust Co.* v. *Bieberbach*, 577.
2. In an action on a promissory note made by a corporation, a request for a ruling directed to the contention that the note was not issued in accordance with the by-laws of the corporation is refused properly, if the evidence justifies a finding that notes issued like that in suit were duly issued as the notes of the corporation. *Ibid.*
3. In this case, which consisted of three actions against the maker and the indorsers of certain promisory notes, the proceedings of the judge in taking the verdicts and ordering them to be recorded were proper. *Ibid.*
4. Notice given in the midst of the trial, in an action against a railroad corporation, to produce its written rules, properly may be held to be insufficient to justify the introduction of secondary evidence to prove one of the rules. *Welch* v. *New York, New Haven, & Hartford Railroad*, 393.
5. Where expert testimony is offered by way of answers to hypothetical questions, much must be left to the discretion of the presiding justice. The jury are instructed to disregard the answers unless they find the facts as assumed in the questions; but as it cannot be known in advance what may be the ultimate decision of the jury as to the facts in dispute, the usual practice is to allow counsel in framing a hypothetical question to assume the existence of such facts and conditions as the jury may have a right to find upon the evidence as it then is, or as there may be fair reason to suppose it may thereafter appear to be; and in determining whether a hypothetical question shall be allowed, the judge in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be; and the evidence in this case as to the services rendered by the plaintiff as an attorney at law, compared with the facts assumed in the hypothetical questions to which exceptions were taken, shows no ground of exception. *Anderson* v. *Albertstamm*, 87.
6. In this case, which was an action to recover for professional services rendered the defendant in a suit in equity, it sufficiently appears that the question put to an expert witness assumed that he knew what was stated in the bill. *Ibid.*
7. If, in an action for a malicious prosecution of a former suit brought by the defendant against the plaintiff, the answer to a question put to a wit-

Digitized by Google

ness, as to what he heard and saw after he arrived at the place where the officer had just attached the alleged property of the defendant in the original action, disclosed anything immaterial or incompetent, the defendant in this action should have asked to have it stricken out; and this not having been done, and no exception having been taken to the answer, he has no ground of complaint. *Walkup* v. *Pickering*, 174.

8. At the trial of an action for personal injuries a witness for the defendant, who for some years had been in charge of the room in which the accident occurred, was allowed to testify as to whether there would have been steam enough in the room at the time of the accident to obstruct the view of a man of ordinary eyesight. The witness was in the room shortly before and shortly after the accident, but not when it occurred. The bill of exceptions did not disclose enough to show that the matter was not one upon which the opinion of a qualified expert was admissible, nor make it clear that the witness was not so qualified. *Held*, that upon both these matters much must be left to the judge who controls the trial. *Barker* v. *Lawrence Manuf. Co.* 203.

9. If, in an action for personal injuries occasioned to the plaintiff by falling through a hole in the floor of the room in which he was employed, the substance of the instruction given as to the assumption of the risk is that if the plaintiff knew that the hole was there, or would have known of it in the exercise of proper care with reference to what was going on there so far as he knew it, he could not recover, and that if he did not know of the opening and would not have known of it in the exercise of proper care, the jury must inquire whether the injury was due solely to some neglect of duty on the defendant's part, the plaintiff has no ground of complaint. *Ibid.*

10. If, at the trial of an action against the P. B. Company, a foreign corporation, for damages for personal injuries sustained by the plaintiff at certain amusement grounds alleged to be operated and controlled by the defendant, the defendant introduced testimony tending to show that it had never done business at the place in question, and that the place was in fact under the control and management of another foreign corporation, which used therewith the name "P. B. Company" without authority from the defendant solely because it was a popular name, evidence is admissible, in rebuttal, of the records of an earlier action against the same defendant to recover damages for personal injuries sustained by another person at the same grounds, which shows that by a petition signed "P. B. Company by H. Manager," the defendant sought a reduction of an attachment of its property, that by its answer it alleged that it was the proprietor of those grounds, and that judgment was entered against it. *Smith* v. *Paul Boyton Co.* 217.

11. At the trial of an action against the P. B. Company, a foreign corporation, for damages for personal injuries sustained by the plaintiff while participating in a sport at certain amusement grounds alleged to be operated and controlled by the defendant, evidence that the defendant's name was painted over the entrance, and that three written instruments made by the defendant as required by law purported to connect it with the business

Digitized by Google

as proprietor, is to be weighed in connection with testimony that the sport in which the plaintiff was engaged when injured was one for which the G. and H. Company was alone responsible, as well as in connection with a contract between the defendant and the G. and H. Company, by which the latter was to construct and equip the whole enterprise, reimburse itself for advances from the receipts from the grounds, and thereafter own the enterprise jointly with the defendant; and requests for rulings that upon all the evidence the action could not be maintained, and that there was no evidence that the contract between the defendant and the G. and H. Company was fraudulent or colorable or otherwise than *bona fide*, were properly refused. *Smith* v. *Paul Boyton Co.* 217.

12. If one of the issues in an action is the genuineness of a signature, and that is the only "subject matter inquired of" under Pub. Sts. c. 167, § 77, by the first ten interrogatories, and there is no other interrogatory or answer upon that subject matter, the action of the court in refusing to order the counsel to read the answers to additional interrogatories, he having declined to read them unless ordered by the court, is correct. *Demelman* v. *Burton*, 363.

13. While it is legitimate for the counsel for the plaintiff to argue that the defendant had deceived his own counsel as to the facts, and in support thereof to contrast the opening argument of the counsel for the defendant and the testimony of the defendant and another witness as to such facts on the one hand with the closing argument of the same counsel on the other hand, he has no right under Pub. Sts. c. 167, § 75, to comment upon the amended answer or the allegations contained therein, nor upon the fact that it was filed after the trial was begun, nor upon the time of its filing as having any bearing whatever upon the argument he is making; nor is it material that the counsel for the plaintiff is stating only what has taken place in the presence of the jury; nor does the fact that the amended answer was filed in their presence warrant them in considering it unless otherwise they would be so warranted. *Ibid.*

See ATTORNEY AND CLIENT, 6; EVIDENCE, 24; EXCEPTIONS, 2–4, 6, 7.

## TRUST AND TRUSTEE.

1. A resulting trust will not be declared in favor of a person who causes land to be conveyed to a woman, not his wife or related to him, in consideration of a cash payment by him of a part of the purchase price and of a note and mortgage given by her to the grantor to secure the balance, although he intends, and she agrees, but not in writing, that the title taken by her in her own name shall be held by her for his benefit. *Dudley* v. *Dudley*, 34.

2. An active trust, requiring the exercise of discretion on the part of the trustee, is not to be terminated at the will of the *cestui que trust*. *Danahy* v. *Noonan*, 467.

3. When a trustee with the full knowledge of the *cestui que trust* has taken all the proceeds of the trust property and has become his debtor for it, the

Digitized by Google

whole transaction has been reduced in fact to a debt due from the trustee to the *cestui que trust*. When this is followed by the financial ruin of the trustee, there is no room to hold that the trust relation also continues, because by the understanding of the two the debt was to be paid when a favorable investment should be found. In such a case there is no trust property except the debt due from the trustee, which cannot be collected, and there is no occasion to end the trust, for it has been already changed into a debt; and the fact that the trustee charged a commission of five per cent on income is not so far inconsistent as to preclude the conclusion that the *cestui que trust* became a creditor of the trustee, there having been much confusion in the minds of both parties throughout the transactions. *Treadwell* v. *Treadwell*, 554.

4. A testator gave the residue of his estate to trustees "to collect the income thereof, and, after deducting the necesarry expenses, to pay over the balance thereof as follows: To my wife, L., the sum of five thousand dollars a year during her natural life . . . to pay over the residue and remainder in equal shares to my said children S., J., B., F., and W. In the event of the death of my said wife, L., I direct that the whole of the income shall be paid over to my said children [named] share and share alike. I direct that the lawful issue of a deceased child, or grandchild, shall take the parent's share by right of representation, but to continue in trust until they shall have arrived to the full age of twenty-one years, the income during minority to be applied for their support and education. In the event of the death of the issue of a deceased child before arriving to the full age of twenty-one years, I give . . . the principal and any accumulated interest thereon to my surviving children, share and share alike." There was also a provision that the daughters' share in the income should not be subject to the control of their husbands or be liable for their debts. The wife died in 1888 and the son F. in August, 1898, having just before been adjudged an insolvent debtor, and leaving four children. *Held*, that the assignees in insolvency of F. were not entitled to any part of the fund, but that a part of the principal of the fund, proportionate to the share of the income received by F. during life, should be divided into four parts, one to be transferred to the oldest child, who had reached his majority, and the other three to be set aside, one for each of the three children, and to be severally held in trust during the minority of each child, and to be transferred to him or her upon coming of age. *Seaver* v. *Griffing*, 59.

5. A testator provided that the residue of his property should be invested "for the term of ten years after my decease, the income to be equally divided between my sons and grandchildren." A codicil provided as follows: "Whereas, by my last will and testament dated the eleventh day of April, 1888, in article 10th I gave to my sons and grandchildren the income of rest and residue of my property, after paying my debts and legacies, to be equally divided between them. I do hereby revoke the said legacy, and instead thereof I give and bequeath the income of the said rest and residue of my property as follows: One eighth of the same to my son J., the other seven eighths to my son A. and my grandchildren to be divided equally between them." A new legacy was added, and the codicil con-

Digitized by Google

cluded as follows: "And I do hereby ratify and confirm my aforesaid will in all respects, except so far as changed or altered by this codicil." *Held*, that there was nothing in the codicil that changed the nature of the trust or the term of its continuance, and that the trust terminated at the end of the ten years after the testator's decease. *Humphreys* v. *Wilton*, 451.

See ACTION, 1; ATTORNEY AND CLIENT 1, 4; EQUITY, 4, 5; ESTATES OF PERSONS DECEASED, 4; LIMITATIONS, STATUTE OF, 2; WILL, 6.

## TRUSTEE IN BANKRUPTCY.

See LIFE ESTATE.

## TRUSTEE PROCESS.

1. An action of tort for slander of title cannot be commenced by trustee process. *McDonald* v. *Green*, 113.

2. The provisions of Pub. Sts. c. 183, § 86, do not give a discretion as to the right of the trustee to receive costs. *McCarty* v. *Nugent*, 124.

3. An action by the assignee of an insolvent debtor to recover the value of goods alleged to have been conveyed by the debtor to the defendant for the purpose of giving him a preference and of preventing them from coming to the assignee is not an action for the recovery of a penalty, but for the recovery of the value of the goods conveyed in fraud of the laws relative to insolvency, and may be commenced by the trustee process. *Rothschild* v. *Knight*, 48.

See ASSIGNMENT, 1; JURISDICTION, 1; SUPERIOR COURT, 2.

## USAGE.

See INTEREST, 1; NATIONAL BANK; SALE.

## VERDICT.

See BROKER, 1; EMPLOYERS' LIABILITY ACT, 8; EQUITY, 7; EXCEPTIONS, 3; TRADE-MARK, 3; TRIAL, 3.

## VIEW.

See EMINENT DOMAIN, 5; EVIDENCE, 26.

## VOTE.

See CORPORATION, 2, 4–6; TOWN.

Digitized by Google

## WAIVER.

See CONTRACT, 6; CONVERSION, 1, 3; ELECTION, 2; INSURANCE, 1, 3; SALE; SAVINGS BANK, 3; WILL, 6; WRIT OF ENTRY.

## WATER AND WATERCOURSE.

See EMINENT DOMAIN, 1-4; EQUITY, 8, 9; PARK COMMISSIONERS.

## WATER RATES.

See RECEIVER.

## WAY.

1. A landowner who has granted a right of way of a definite width cannot narrow that width by building a permanent fence upon it. *Hamlin* v. *New York, New Haven, & Hartford Railroad*, 514.
2. Upon the facts of this case, which was a suit in equity to restrain the obstruction of a right of way over a railroad, the defendant had no right to maintain gates or bars at the crossing in question. *Ibid.*

See ACTION, 3; DEED, 2; EQUITY, 6; HIGHWAY; RAILROAD, 1.

## WIDOW.

See EQUITY, 4; WILL, 6.

## WILL.

1. Witnesses to a will must sign after the testator has signed. *Marshall* v. *Mason*, 216.
2. If an offer is in substance to show by a previous declaration of the testator in regard to the disposition of his property by a will then existing, that he understood the will in a way which would make it improbable that he would refer to it as he did in the codicil as it was finally written, the judge, in the exercise of his discretion, may well hold, in view of other facts, that the evidence is too remote. *Wilton* v. *Humphreys*, 253.
3. At the trial of a petition for revocation of probate of a codicil, on the ground that certain words materially altering the legal effect were added after execution, the petitioner is not entitled to a ruling "that the words in the margin being unnoted, and being in different ink, the presumption of law in this case is that they were added after execution," there being no presumption of law in a case of this kind as to the time when the disputed words were written, but the question being one of fact to be determined on all the evidence; and another reason which justifies the refusal to give the ruling is that all presumptions are in favor of the decree, and

Digitized by Google

it cannot be set aside without clear proof, the burden being on the petitioner. *Wilton* v. *Humphreys*, 253.

4. The burden of proof is on a party presenting a will to show that alterations or interlineations in it were made before its execution, and unless there is something in the nature of them, as applied to other parts of the writing, or unless there is other evidence to show that they were a part of the will when it was executed, they will be rejected for want of proof; and anything in the paper itself, as well as in the evidence from outside, which makes it more probable that the changes were made before the execution than that they were made after execution, is sufficient to give the alterations validity. *Ibid.*

5. By A.'s reference in his will to a legacy given by B. in his will, without reciting at length the provisions of the will in regard to it, A. adopts for his property the disposition which B. makes of the legacy; and the questions raised under the will of A. are answered by the decision of the court in regard to the will of B. *Dexter* v. *Harvard College*, 192.

6. A testator gave by will the residue of his estate, in trust, the income of one half to be paid to his son O., and the income of the other half "to my wife, or they (the trustees) shall apply the income and interest as they may judge best to the support and maintenance of my wife and children by her begotten, till there is no child surviving under twenty-one years of age, or till all shall have died before arriving at the age of twenty-one years. After they shall have arrived at twenty-one years of age, one half of the income shall be paid to my wife, during her lifetime. And the other half (and the whole, in case my wife shall have deceased) shall be applied to the support and maintenance of the children mentioned in this part of my will and the whole income at the death of my wife." The testator was twice married, and left as his only issue two sons, O. by his first wife, and H., a minor of eighteen, by his second and surviving wife, who waived the provisions of the will. *Held*, that before H. became of age the income of one half of the residue being payable to the widow and H. jointly became, under the doctrine of *Plympton* v. *Plympton*, 6 Allen, 178, payable to H. alone, and that after H. became of age the income payable to the widow was sequestered to compensate the disappointed legatees O. and H., and was payable to them severally in the ratio in which they were respectively disappointed. *Shreve* v. *Shreve*, 456.

See DEVISE AND LEGACY; LIFE ESTATE; PUBLIC CHARITY; WITNESS, 2.

## WITNESS.

1. To affect the credibility of a witness under Pub. Sts. c. 169, § 19, the defendant was allowed, against the objection of the plaintiff, to put in evidence the record of the conviction of the witness in the Circuit Court of the United States, in 1878, for fraudulently violating a registered trade-mark. The next day the attention of the court was called to the fact that shortly after the conviction the statute was declared to be unconstitutional. The judge instructed the jury that the effect of the convic-

Digitized by Google

tion was for them, and that the fact that the statute had been declared unconstitutional could be taken into consideration. *Held*, that the defendant had no ground of exception. *Scannell* v. *Boston Elevated Railway*, 170.

2. If a person is called as a witness, evidence offered of statements made by him tending to contradict his testimony, without previously calling his attention to the statements, is rightly excluded under Pub. Sts. c. 169, § 22; and it is a sufficient answer to the contention that, because the witness was a witness to the will and codicil in question, the statute should not apply to him, that he was not called as a witness to prove the will and codicil, they having been proved and allowed many years before, but to show that the decree of the Probate Court was erroneous. *Wilton* v. *Humphreys*, 253.

See COSTS; DISCOVERY; EVIDENCE, 12, 15, 24; EXPERT; SLANDER; TRIAL, 5–8; WILL, 1.

## WORDS.

"Actions of tort . . . for slander either by writing or speaking." See *McDonald* v. *Green*, 113, 115.

"All painters not affiliated with the Baltimore headquarters to be non-union men." See *Plant* v. *Woods*, 492, 494.

"And." See *Dudley* v. *Milton*, 167, 169.

"And their heirs." See *Adams* v. *Jones*, 185, 187, 188.

"Annual account taking of the stock, assets, and debts owing to and by the said firm." See *Kelly* v. *Morrison*, 531, 535.

"Are to be always so used and enjoyed as to do no unnecessary damage to said railroad bed and track, and always so as not to obstruct, impede, or delay any car or cars, engine or engines, train or trains, when in motion on said railroad tracks." See *Hamlin* v. *New York, New Haven, & Hartford Railroad*, 514, 519.

"As hereby laid out and ordered." See *Watertown* v. *County Commissioners*, 22, 31.

"Association." See *Commonwealth* v. *Rozen*, 129, 131.

"At her [his sister's] decease, I give and devise the balance of my estate, of whatever name or nature, to the town of Natick, but in trust nevertheless, the income of which is to be used for the preservation of the monument which my executor is hereby authorized to erect at my grave, and for the care and beautifying of my lot in the cemetery. . . . The town shall not expend a greater sum than four per cent per annum, deeming that as large an amount as the town ought to pay." See *Morse* v. *Natick*, 510, 513.

"At the option." See *Prouty* v. *Union Hardware Co.* 155, 156.

"Bond and Surety approved." See *Parke* v. *Mabee*, 236.

"By other acts." See *Holleran* v. *Boston*, 75, 76.

"Capital." See *D'Ooge* v. *Leeds*, 558, 560.

"Carriage." See *Richardson* v. *Danvers*, 413, 414.

Digitized by Google

"Charge or control of." See *Welch* v. *New York, New Haven, & Hartford Railroad*, 393, 398.
"Charge the same to our account." See *Morrison* v. *Lamson*, 536, 540.
"Charitable institution." See *Hooper* v. *Shaw*, 190, 192.
"Children." See *Paine, petitioner*, 242, 245.
"Current month's account." See *Celluloid Co.* v. *Haines*, 415, 417.
"Debt (A) created by fraud or embezzlement of the debtor." See *Tallant* v. *Stedman*, 460, 465.
"Drugs and medicines." See *Commonwealth* v. *Goldsmith*, 104, 105.
"Equal in amount." See *Durgin* v. *Colburn*, 110, 112.
"Equities." See *Morrison* v. *Lamson*, 536, 541.
"Existing right of way." See *Simpson* v. *Boston & Maine Railroad*, 359, 362.
"Express." See *Weeks* v. *Parsons*, 570, 576.
"Findings." See *Clapp* v. *Wilder*, 332, 337.
"For a year." See *Commonwealth* v. *Morris*, 19, 21.
"For which provision is not made in." See *Bassett* v. *Drew*, 141, 144.
"From equities on hosiery consigned to you." See *Morrison* v. *Lamson*, 536, 540.
"House (The) in which she now lives, situated on Brook Road, Milton, and subject to a mortgage," etc. See *Dudley* v. *Milton*, 167, 168.
"I direct that the lawful issue of a deceased child or grandchild shall take the parent's share by right of representation." See *Seaver* v. *Griffing*, 59, 62.
"If either of the said partners shall die during the continuance of the said partnership, his interest in the assets and property of the said firm shall be conclusively, finally, and for all purposes taken to be the balance standing to his credit as of the next preceding annual account taking of the stock." See *Kelly* v. *Morrison*, 531, 533.
"If said property shall be sold." See *Clinton* v. *Norfolk Mutual Fire Ins. Co.* 486, 489.
"I further direct that if any of the other legatees named in my will or codicils thereto shall die before my decease, the legacies therein given shall lapse, and the amount thereof shall be included in the residue of my estate." See *Lyman* v. *Coolidge*, 7, 8.
"I hereby revoke the residuary clauses in my will and codicils, and in lieu thereof I hereby give all the rest and residue of my estate remaining after the payment of the specific legacies provided in my will and the several codicils thereto, as follows: One third thereof to my nephew, A.; one third thereof to my nephew, B.; one sixth thereof to my nephew, C.; and one sixth to my niece, D." See *Lyman* v. *Coolidge*, 7, 8.
"Immediate written notice." See *National Construction Co.* v. *Travelers' Ins. Co.* 121.
"In case the premises, or any part thereof, shall be taken for any street or other public use, or by the action of the city or other authorities, . . . then this lease and the term demised shall terminate at the election of the lessors or those having their estate in the premises." See *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.* 115, 116.
"Income." See *D'Ooge* v. *Leeds*, 558, 560.

Digitized by Google

"Income (The)." See *Humphreys* v. *Wilton*, 451, 453.
"In common with all other persons, if any, who have the right to use the same." See *Hamlin* v. *New York, New Haven, & Hartford Railroad*, 514, 518.
"Institution." See *Hooper* v. *Shaw*, 190, 192.
"In the proportion fixed by the sixth clause." See *Paine, petitioner*, 242, 245.
"Locate anew." See *Watertown* v. *County Commissioners*, 22, 31, 32.
"Malice." See *Fay* v. *Harrington*, 270, 274.
"My brothers and sisters." See *Adams* v. *Jones*, 185, 187.
"Name or names." See *Commonwealth* v. *Rozen*, 129, 130.
"Next preceding annual account taking of the stock." See *Kelly* v. *Morrison*, 531, 535.
"No agent has authority to waive or alter anything in this policy." See *National Construction Co.* v. *Travelers' Ins. Co.* 121, 123.
"No income or principal shall in any case be assignable or alienable by anticipation, or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his or her actual receipt thereof." See *Munroe* v. *Dewey*, 184, 185.
"Of." See *Framingham Water Co.* v. *Old Colony Railroad*, 404, 409.
"Old Ladies' Home." See *Sherman* v. *Congregational Missionary Society*, 349, 351.
"One year from the time of the adoption of the order." See *Danforth* v. *Groton Water Co.* 118, 120.
"Or as he may direct." See *Pease* v. *Royal Society of Good Fellows*, 506, 508.
"Pass on to his and their own land at any angle whatever with said railroad bed that he and they may see fit, whether within said thirty-eight and one half feet or not, but not more than ten feet outside of said thirty-eight and one half feet." See *Hamlin* v. *New York, New Haven, & Hartford Railroad*, 514, 517.
"Pay a commission of two per cent." See *Fitzpatrick* v. *Gilson*, 477, 480.
"Per annum." See *Commonwealth* v. *Morris*, 19, 21.
"Person." See *Commonwealth* v. *Rozen*, 129, 130, 131.
"Pipes." See *Lincoln* v. *Street Commissioners*, 210, 215.
"Pledger." See *J. H. Wentworth Co.* v. *French*, 442, 444.
"Property (The)." See *Dudley* v. *Milton*, 167, 168.
"Property . . . which shall pass . . . to any person." See *Hooper* v. *Shaw*, 190, 191.
"Public charity." See *Dexter* v. *Harvard College*, 192, 194.
"Relocate." See *Watertown* v. *County Commissioners*, 22, 31, 32.
"Reserving, however, a crossing or right of way to be maintained and kept in repair at the expense of said railroad corporation, and to be thirty feet wide and to cross said road or track on a line parallel with the southeasterly line of said Simpson's land, and to be distant one hundred feet southwesterly therefrom." See *Simpson* v. *Boston & Maine Railroad*, 359, 361.
"Resident of the Territory." See *Andrews* v. *Andrews*, 92, 94

Digitized by Google

"Rest Home." See *Sherman* v. *Congregational Missionary Society*, 349, 351.
"Said relocation." See *Watertown* v. *County Commissioners*, 22, 30.
"Shop." See *Commonwealth* v. *Graham*, 5, 6.
"Shut-off box." See *Redford* v. *Woburn*, 520, 521.
"Situation (The), or circumstances affecting the risk, shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks," or "the said property shall be sold." See *Clinton* v. *Norfolk Mutual Fire Ins. Co.* 486, 488.
"Subject matter inquired of." See *Demelman* v. *Burton*, 363, 364.
"Subway." See *Browne* v. *Turner*, 9, 14.
"Such injuries alone." See *Moore* v. *Wildey Casualty Co.* 418, 422.
"Suitable." See *Roche* v. *Smith*, 595, 596.
"Superintendence." See *Eaves* v. *Atlantic Novelty Manuf. Co.* 369, 373.
"Time." See *Atlas National Bank* v. *National Exchange Bank*, 300, 303, 304, 308.
"To continue in trust until they shall have arrived to the full age of twenty-one years." See *Seaver* v. *Griffing*, 59, 65, 66.
"To give her full control, . . . with full power to deed to her grantees, their heirs and assigns forever." See *Morse* v. *Natick*, 510, 512.
"To locate anew a road within such town." See *Watertown* v. *County Commissioners*, 22, 24.
"To pay over the residue and remainder in equal shares to my said children." See *Seaver* v. *Griffing*, 59, 62.
"To procure a loan." See *Fitzpatrick* v. *Gilson*, 477, 478.
"To sell and dispose of so much . . . as will ensure her a comfortable living." See *Morse* v. *Natick*, 510, 512.
"To the children of my deceased brothers and sisters all the rest of said stock or securities to be divided among them as provided in the statutes of the Commonwealth in such cases made and provided." See *Paine, petitioner*, 242, 243.
"Upon the express condition." See *Clapp* v. *Wilder*, 332, 335.
"Value asked and not given." See *Grares* v. *Adams Express Co.* 280, 282.
"W. C. T. U." See *Sherman* v. *Congregational Missionary Society*, 349, 352.
"We hereby guarantee the payment to Mr. R. of a dividend of 6 % per annum on stock subscribed to this day in the corporation of," etc. See *Rotch* v. *French*, 1, 2.
"We hereby guarantee the payment within note." See *Edgerly* v. *Lawson*, 551, 553.
"Whole (The) of the income." See *Seaver* v. *Griffing*, 59, 62, 63, 64.
"Will either pay . . . as liquidated royalty, or will submit to the cancellation of this license at the option of the party of the first part." See *Prouty* v. *Union Hardware Co.* 155, 156.

## WRIT OF ENTRY.

On a writ of entry the pleading by a tenant of a general denial is irregular in form, but by submitting the case on agreed facts the parties waive all questions of form. *Morse* v. *Natick*, 510.

Digitized by Google

## WRIT OF ERROR.

1. Issues of law and issues of fact may be joined in the pleadings upon a writ of error. *Rothschild* v. *Knight*, 48.
2. A single justice of this court may hear the evidence relative to issues of fact upon a writ of error, and, if he chooses, may report the case to the full court. *Ibid.*

See COSTS.

## WRITTEN INSTRUMENTS.

See ACTION, 2; ASSIGNMENT, 1; ATTORNEY AND CLIENT, 4; CONTRACT, 2–6; CONVERSION, 1, 3; DEED; DEVISE AND LEGACY; EVIDENCE, 16–20, 23, 24; FRAUDS, STATUTE OF; GUARANTY; INSURANCE; LANDLORD AND TENANT, 2; MECHANIC'S LIEN, 2; MORTGAGE, 3; PARTNERSHIP, 1; PROMISSORY NOTE; WILL.

Digitized by Google

Digitized by Google

## ERRORS NOTED IN PREVIOUS VOLUMES.

### Pickering, Volume I.

Page 281, 8th line from bottom, insert semicolon after the word "offered."

### Volume CXXXIV.

Page 482, 7th line from top, for "Suffolk" read "Middlesex."

### Volume CXLVI.

Page 132, 8d line of head note, for "he" read "the person named therein."

### Volume CLII.

Page 168, 5th line of second head note, for "he asked" read "he was asked."
Page 270, 19th line from top, for "385" read "384."
Page 532, 6th line of head note, for "§ 6" read "§ 61."

### Volume CLVII.

Page 430, 15th line from bottom, for "plaintiff" read "defendant."

### Volume CLVIII.

Page 200, 1st line of second head note, for "person licensed" read "person who is licensed"; and in second line of same head note dele the word "and."

### Volume CLX.

Page 392, 10th line of head note, for "the point" read "that point."

### Volume CLXVII.

Page 596, 8d line from bottom, for "1897" read "1895."

### Volume CLXX.

Page 855, 1st line of foot note, for "bill of exceptions" read "agreed facts."

### Volume CLXXII.

Page 162, 6th line from bottom, for "liberal" read "literal."
Page 226, last line of foot note, insert "See St. 1892, c. 275."

Digitized by Google

VOLUME CLXXIII.

Page 610, 2d line from bottom, for "390" read "391."

VOLUME CLXXV.

Page 367, 3d line from bottom, for "defendants" read "plaintiffs."

Page 396, 5th line from bottom, dele "amended by Sts. 1877, c. 204, and 1880, c. 196."

Page 397, 7th line from top, insert "1877, c. 204, § 1. Pub. Sts. c. 115, § 8. The subsequent act of" after "St."

Page 397, 19th line from top, insert "St. 1880, c. 196, § 3. Pub. Sts. c. 115, § 9," after the word "designated."

Page 490, 12th line from top, for "eighteen hundred and eighty-five" read "eighteen hundred and eighty-four."

Digitized by Google

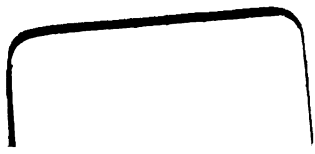
Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

HARVARD LAW LIBRARY



Digitized by Google

Digitized by Google